Study B-700 October 24, 1995

Memorandum 95-57

Unfair Competition: Revised Draft of Tentative Recommendation

At the September meeting, the Commission began considering the staff draft of a tentative recommendation on *Unfair Competition Litigation*, but did not finish before time ran out. The memorandum and supplements under consideration at the September meeting have been combined for convenience in this memorandum. The staff notes in the draft statute have been updated to refer to several of the comments made in letters attached as exhibits, but only as to issues that have not been considered and resolved. The attached draft tentative recommendation implements the decisions made at the September meeting, although further work needs to be done in some sections. (The draft statute begins on page 11 of the attached draft tentative recommendation.)

The explanatory text of the draft tentative recommendation has been minimally revised; once the Commission has completed review of the draft, the staff will revise the explanatory text to explain the draft in greater detail. The current version is included here to provide background.

Exhibits attached to this memorandum include the following:

	pp.
1.	Prof. Robert Fellmeth, Revised Consultant's Draft (July 1995) 1
2.	Thomas A. Papageorge, California District Attorneys Association Consumer Protection Committee (CDAA), June CDAA Draft
3.	Gail Hillebrand, Consumers Union, San Francisco
4.	Thomas A. Papageorge, CDAA, Los Angeles
5 .	Jan T. Chilton, Severson & Werson, San Francisco
6.	S. Chandler Visher, San Francisco 32

Since the draft statute is fairly short and is intended to provide an integrated procedure, at the November meeting the staff would like to review the draft statute from the beginning (p. 11), moving fairly quickly over the parts that have already been considered, and concentrating on draft Sections 385.30-385.44 (p. 16 et seq.) which have not yet been reviewed.

Constitutional Limits on Binding Absent Parties

Late in the discussion at the September meeting, the question arose as to the extent to which absent parties may be constitutionally bound in the context of representative actions. The staff analysis of the issues in this area, focusing on federal and state class action law and considering its application to unfair competition actions, was presented in Memorandum 95-35 at the June meeting. The issues are complex and not fully resolved, but general conclusions can be drawn, even if some of the finer distinctions are open to speculation.

Class action procedures meet constitutional requirements, but not all class action rules are constitutionally mandated. In other words, class action law is not automatically applicable to representative actions in unfair competition litigation. The class action rules of constitutional dimension must be strained out of the voluminous state and federal case law.

The open-ended standing afforded by Business and Professions Code Section 17204 permitting a suit on behalf of the general public for injunctive relief and restitution is inconsistent with several fundamental rules applied in class actions. The plaintiff need not be an adequate representative of the class of injured persons in the sense of having suffered the alleged injury. A class representative, on the other hand, must be a member of the represented class. We cannot say for certain whether the protections in the draft statute directed toward plaintiff adequacy — lack of a conflict of interest and adequate legal representation — are sufficient to overcome the weight of authority in the class action context. The staff concluded that it would be controversial and that there would be no guarantee that the courts would find it constitutionally sufficient to bind absent parties in unfair competition actions.

The other major problem is notice and an opportunity to be heard. No certain conclusions can be drawn. Notice may not be required in an action for injunctive relief, where the case is not predominately for monetary relief (or "damages"). The scope and form of notice would also be an issue. If notice is required, then mere published notice is not likely to be sufficient to save a statutory scheme that is suspect on due process grounds, although such notice may be permissible in some cases. Requiring class action type notice raises the serious issue of expense and would eliminate one of the major advantages of the unfair competition statute over class actions from the perspective of plaintiffs — perhaps the most attractive feature of the unfair competition statute from a litigation standpoint.

In view of these uncertainties, a statute that attempted to impose binding effect under the current draft statute could result in much litigation as the parties and courts tried to apply the constitutional principles in each case. Settlement would be uncertain, since the effect would be unknown until a court had determined the issue in a later action. Some statutory guidelines are needed or the courts will have to fill in the rules on a case by case basis (or hold the statute unconstitutional). This is not to say that the working approach — providing minimum standards of adequacy and precluding only later representative actions — is the only constitutional approach. It could be combined with a rule that attempted to distill the case law applicable to injunctive cases and assert a binding effect on absent parties. But any approach that seeks to test the constitutional limits will necessarily result in appeals until the issues are settled. Other creative options may also be available.

Location of Statute

The June Minutes note the opinion of commentators at that meeting that the statute should be located in the Code of Civil Procedure. The concern expressed at the meeting was that undue attention might be drawn to the unfair competition statutes themselves if the rules on litigation were added to the Business and Professions Code. This point is made in Gail Hillebrand's letter on behalf of Consumers Union. (See Exhibit pp. 10-11.)

Professor Fellmeth's early proposals were directed to the relevant parts of the Business and Professions Code. His July draft (see Exhibit pp. 1-6) would place the new statute immediately following Code of Civil Procedure Section 382, the class action statute.

In order to provide more drafting elbow room, the staff draft adds a new chapter following the chapter on "Permissive Joinder" in which Section 382 appears. In Memorandum 95-43, the staff concluded that it is "not inappropriate" to locate a statute on representative actions in this vicinity of the Code of Civil Procedure. Title 3 (commencing with Section 367) of this part of the Code of Civil Procedure — entitled "Of the Parties to Civil Actions" — includes chapters entitled General Provisions, Married Person, Disability of Party, Effect of Death, Permissive Joinder, Interpleader, Intervention, and Compulsory Joinder. Note that the draft statute goes beyond the issue of parties and joinder, but so do several of the other existing provisions. There are a few of special rules of limited application in these general statutes on civil procedure that arguably could have

been placed elsewhere. See, e.g., Sections 376 (suit by parents for injury to child), 383 (suit by common interest development association).

As the draft takes shape and we approach possible approval of a tentative recommendation to be circulated for comment, the Commission needs to be certain on where the statute should be located. While it may not be inappropriate to put it in the Code of Civil Procedure, the obvious and appropriate place to put a statute dealing with unfair competition litigation under Business and Professions Code Sections 17204 and 17535 is in that code. This part of the Business and Professions Code is not ideally organized, but there is room following Chapter 5 (commencing with Section 17200) (Enforcement) in Part 2 (commencing with Section 16600) (Preservation and Regulation of Competition). The basic unfair competition statute is in one part and the related false advertising statute, which is incorporated by Section 17200, is in another — Article 2 (commencing with Section 17530) (Particular Offenses) of Chapter 1 (Advertising) of Part 3 (Representations to the Public). Adding a new chapter following the 17200 series is fairly consistent with the existing structure. It is also consistent with the approach normally taken, as in the Consumers Legal Remedies Act, Civ. Code § 1750 et seq., which contains its own special class action rules.

Respectfully submitted,

Stan Ulrich Assistant Executive Secretary JUL-10-1995 17:47

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UNFAIR COMPETITION LIMITED VERSION THROUGH CCP CLARIFICATION

This is a revised version of Professor Fellmeth's Alternative Draft, which was discussed at the San Diego meeting of June 29, 1995. This version incorporates the suggestions of the California District Attorneys' Association as to the public/private conflicts, and the suggestions of Harry Snyder/Gail Hillebrand and Commission members as to private/private conflicts and safeguards. In terms of the private/private conflicts, and as discussed at the meeting, the res judicata effect is confined to cases brought on behalf of the "general public" or on behalf of other, unnamed parties; while preserving the relitigation rights of any individual as to restitution or damages (unless double recovery would result). If the parties and court wish to bind absent parties, there must be satisfactory notice - as specified in staff's analysis.

Code Civ. Proc. 382.5 (added). Action on behalf of general public under Business and Professions Code Section 17204 or 17535 SEC.____. Section 382.5 is added to the Code of Civil Procedure, to read:

- § 382.5. (a) Where there is a conflict in representation between private parties representing members of the public who are not named parties, and a public prosecutor representing the general public, and that conflict pertains to defendants based on the same alleged acts and bases for liability, pursuant to Section 382 or 382.5, or Business and Professions Code Sections 17204 or 172353, or otherwise covering the same acts, bases for liability, and remedies, the public prosecutor is presumed to be a superior representative of the public, and particularly of the members of the public within his or her jurisdiction.
- (1) Such a presumption is rebuttable where another party can demonstrate:
- (A) a substantial conflict-of-interest on the part of the public prosecutor in the representation of the relevant public which is not present in the case of an alternative party and counsel; or
- (B) resource or expertise inadequacy in representation by the public prosecutor, and where substantially superior resources and expertise are alternatively available.
- (2) The selection of proper party and counsel to proceed on behalf of the general public or absent class members, where there is such a conflict, may be determined at any time and may be based on the initial pleadings of the actions in conflict.
- (3) A judgment obtained by a public prosecutor involving restitution or monetary relief on behalf of the people in a civil

action pursuant to Chapter 5 (commencing with Section 17200) of Part 2 of Division 7 or Part 3 (commencing with Section 17500) of Division 7 of the Business and Professions Code is res judicata as to all other actions purporting to represent the general public or unnamed parties.

- (A) Any preference decision shall be subject to the right of private counsel in such actions to obtain costs and attorney's fees pursuant to Section 1021.5 or other applicable theories.
- (B) Where preference is granted to a public prosecutor, the timely notice by private counsel of the planned or filed private action, and assistance to the public prosecutor, shall be relevant in meeting the requirement of beneficial contribution under Section 1021.5. Advance notice may be sent to: the consumer Law Section of the Office of Attorney General, the consumer department or division of the district attorney of the county in which the action is to be commenced; if the action is to be commenced in a city with a population over 750,000 persons, the city attorney. Where such beneficial contribution has occurred, the private plaintiff need not prevail himself in order to qualify for attorney fee recompense under Section 1021.5.
- (4) Such a judgment shall be res judicata as to actions brought by named individuals for restitution or damages on their own behalf, where the following conditions are met:
- (A) Notice is given sufficient to protect the due process rights of absent members of the public who may be collaterally estopped by the public action, either by individual notice, or by publication or other forms of notice ordered by the court if individual notice is not practical, of the terms of the restitution and of the time and place of a public court hearing to consider its approval.
- (B) At or before the hearing, a person desiring to opt out of the injunctive or restitutionary terms of the judgment as applicable to him or her shall have an opportunity to be so excluded.
- (C) Any person objecting to the fairness or adequacy of the proposed judgment shall have an opportunity to comment.
- (D) The Court shall consider all comments relevant to the proposed judgment and may alter its terms or its res judicata scope or effect in the interests of justice.

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Comment: This revision of the public/private conflict problem is based on the CDAA draft and subsequent discussion by the Commission. It amends the Code of Civil Procedure.

It creates a rebuttable presumption that the public prosecutor is a superior representative of the general public, particularly those within his or her own jurisdiction. However, as discussed with the Commission, where a private public interest counsel can demonstrate either a conflict or inadequate resources vis-a-vis those available to private counsel, private representation is not precluded. Hence, to cite the extreme example noted in discussion, in the situation where the district attorney of a county with a population of 8,000 persons attempts to represent the consumers in the entire state for restitution and a leading public interest firm presents an alternative and superior representative, it may be considered.

There is no notice requirement to a public prosecutor included. Rather than a negative prohibition, the reformulation proposes a positive incentive to pre-notify and to cooperate with public prosecutors by providing that such notice and cooperation are relevant to a subsequent attorney fee claim under § 1021.5 which must measure "beneficial contribution" to the outcome.

There is also no notice or hearing requirement imposed on the public prosecutor in the normal course. And the conclusion of a case, including one imposing a restitutionary remedy, is resjudicate as to any other person seeking to represent the general public or absent class members. As discussed at the Commission meeting, this would not bar an individual from seeking relief based on damages or harm to him or her. To obtain that more extensive res judicate effect, the public prosecutor would have to comply with the more extensive notice requirements constitutionally necessary to preclude remedy by those individually harmed. Although such a course would be rather rarely chosen by public prosecutors, provision is included for it.

Note also that (b(3)(A)) below requires that private plaintiffs serve any other public or private plaintiffs with pending cases against the defendant in advance of settlement. Hence, for example, if a public prosecutor has filed a case, it cannot be settled out by private counsel without notice and opportunity for a preference decision to be made.

- (b) An action may be commenced and maintained on behalf of the "general public" by a private party pursuant to Section 17204 or 17535 of the Business and Profession Code only where all of the following requirements are satisfied:
- The plaintiff states such a cause of action separately from all others, and designates it as being brought "on behalf of the general public pursuant to Chapter 5 (commencing with Section 17500) of Division 7 of the Business and Professions Code within the pleadings.
 - (2) The court finds both of the following:
- (A) That counsel for the plaintiff is an adequate legal representative of the interests of the general public pled.
- (B) That no plaintiff or counsel for plaintiff has a conflict of interest that might compromise the good faith representation of the interests of the general public pled.
- (3) At least 45 days before entry of final judgment or any modification of a final judgment or order thereunder, the plaintiff gives notice of the proposed terms, including all stipulations and associated agreements between the parties, and of the place and time for scheduled hearing on the entry of final judgment to all of the following:
- (A) Any other party with a case pending against the same defendant or defendants based on the similar facts and theories of liability;
- (B) To any regulatory agency with jurisdiction over the defendant relevant to the allegations in the pleadings; and
- (C) To a registry of such actions to be maintained by the Attorney General and available to any person requesting it upon payment of the cost of its provision.
- (4) The court may grant such preliminary relief as may be necessary in the interests of equity prior to entry of final judgment and the required notice thereon.
- (5) At the hearing to consider the final judgment, the court shall affirmatively inquire, whether or not other persons or objectors appear; and find that:
- (A) the defendants have disclosed any other cases pending based on similar facts and theories of liabilities;
 - (B) the attorney's fees to be paid are appropriate

given the work undertaken, the risk involved, and the balance of relief between counsel and public beneficiaries;

- (C) the plaintiffs and their counsel meet the requirements of (2) above, and have provided notice pursuant to (3) above.
- (D) the pleadings and proposed stipulations and judgment are adequate and the entry of the judgment is in the interests of justice; and
- the complaint has not been amended or supplemented in a manner affecting the interests of the "general public claimed, unless the court finds affirmatively that the relief granted satisfies those claims, and that the change in the pleadings does not prejudice members of the general public to be affected by the judgment.
- (6) Such an action on behalf of the "general public" is res judicata only insofar as it bars actions on behalf of the general public or absent class members. Named parties bringing suit because of damage or harm to them individually are not collaterally estopped by the judgment unless the requirements of Section 382 are met.
- (c) Notwithstanding (a) and (b) above, an individual may be collaterally estopped from litigating as to damages or harm he or she has suffered where he or she has accepted and benefitted from restitutionary relief granted to the general public or to others, sufficient to satisfy or recompense him or her for those claims.

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Comment: This reformulated version corresponds to the discussion at the Commission meeting. Private parties may bring actions on behalf of the general public; however, they must be separately pled. They will collaterally estop any other person from bringing a similar action on behalf of the general public whose rights are being litigated, but will not bar individuals from bringing actions on their own behalf for damages or harm done to them (unless and to the extent the general public restitutionary relief which he or she benefitted from). Accordingly, the notice to be given is based not on the due process rights one has to not have others adjudicate as to his property, but the broader social issue of who should represent the general populace...persons other than the one filing suit.

Even though res judicata is limited to other attempts to represent parties not directly named and before the court, there are due process and justice implications, since a settlement will bar others from similarly resolving a case for the general public. However, the notice required is less, both because the property interest in representing other persons is much less, and because as practical matter those interested general in representation are able to monitor a registry. Accordingly, the notice requirements are not expensive, but allow those most likely to seek similar representation to contest a possibly abusive result. Regulatory agencies whose policies may well be implicated and any other parties with pending actions are notified, as is a registry kept with the Attorney General and available to requestors upon payment of costs (to prevent the registry from becoming a financial problem).

Finally, in addition to notice, the court is obligated to affirmatively inquire into lack of conflict, adequacy, and amendment of pleadings; and there is an obligation of disclosure of any other pending cases. These additional safeguards are appropriate since a large-scale resolution is being accomplished. Often this occurs in the context of practical control of the case by private counsel who is extracting what may be substantial attorney's fees; hence, each of the inquiries enumerated is relevant.

LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE BUREAU OF SPECIAL OPERATIONS • CONSUMER PROTECTION DIVISION

GIL GARCETTI • District Attorney
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June 28, 1995

Colin W. Wied, Chairperson Stan Ulrich, Assistant Executive Secretary California Law Revision Commission 4000 Middlefield Road, Suite D-2 Palo Alto, California 94303-4739

Re: Study B-700 -- Unfair Competition

Dear Chairperson Wied, Mr. Ulrich and Members:

I write on behalf of the California District Attorneys Association Consumer Protection Committee, as well as my own office, to provide further information on the views of public enforcement officials regarding the unfair competition issues under consideration by the Commission.

First let me express the thanks of all my colleagues for your kind consideration of the views of the public law enforcement community in this regard. Bus. & Prof. Section 17200 is the principal law enforcement tool used by California prosecutors to protect the public from unfair and deceptive business practices, and it has served the public very well in that role. While we agree that further clarification, especially on the principal issue of finality in public and private litigation, is appropriate, we especially appreciate your careful efforts to avoid hampering legitimate law enforcement uses of this statute.

In that regard, thank you for the assistance of Mr. Ulrich in providing questions of Commission interest for our recent statewide Economic Crime Prosecution Conference. This letter presents initial ideas and a draft proposal to help address some of those questions. Coming only a day after our committee's formal meeting on this subject, the following remarks will be brief, but further discussion of these ideas will follow shortly.

The issue of standing to represent the "general public" (see Section 17204), and the related issue of finality in the context of public and private litigation, merit the attention of the Commission. Although public officials believe problems in this area arise in a only very small percentage of cases, we nonetheless believe it may be fruitful to address these matters with greater clarity in California law.

In particular, where a public enforcement action under Section 17200 has been brought and appropriate remedies have been obtained on behalf of the people of the state, private litigants

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have a reasonable interest in knowing that the matter is final. If the "general public" has already been well served by a public enforcement action, a defendant should be able to assert this as a defense to subsequent redundant private actions. In addition, as enforcement agencies serving the public under the leadership of elected officials, public prosecutors have a reasonable interest in precedence over substantially similar private actions purporting to represent the general public.

The attached draft proposal represents our initial view of a statute of more general application (to be located in the Code of Civil Procedure) which might properly address these reasonable concerns. This proposal provides that in matters brought by a private party acting "for the interests of the general public":

- o The private action shall be stayed, upon the prosecutor's application, until the final judgment is reached in the public action;
- o The defendant(s) shall have a complete defense to a substantially similar private action if the public judgment obtained appropriate injunctive and other relief;
- ° A rebuttable presumption of the sufficiency of the public judgment shall exist if so indicated by the court in the public judgment.

This proposal would address and resolve the most pressing of the concerns expressed in the Prof. Fellmeth's analysis of the present statute. Both finality of these matters and the role of private actions in defending the general public would be clarified. Inappropriately redundant private actions would be discouraged and a greater measure of finality promoted.

We invite your consideration of this proposal and welcome an opportunity to continue to provide input into your analysis of the important law enforcement statute. More detailed analysis of these and related issues will be provided as you might wish.

Thank you once again for your consideration of our views.

Best regards,

GIL GARCETTI

District Attorney

By Hromas G. T

THOMAS A. PAPAGEORGE, Head Deputy

Consumer Protection Division

Chair, Legislative Subcommittee, CDAA Consumer Protection Committee Section 388.5 is added to the Code of Civil Procedure to read:

- 388.5 (a) For the purpose of this section, the following definitions apply:
- (1) "Law enforcement agency" means the Attorney General, a district attorney, or a city attorney authorized by statute to bring an action in the name of the people of the State of California.
- (2) "Private party" means a person acting for the interests of the general public.
- (b) This section applies to actions pursuant to a statute providing a cause of action to a law enforcement agency and a private party to redress the violation of law.
- (c) If a law enforcement agency and a private party have pending actions against the same defendant based on substantially similar alleged facts or violations of law, the court shall, upon the law enforcement agency's application, stay the private party's action, regardless of the order of filing or the stage of proceedings, until a final judgment is obtained in the law enforcement agency's action.
- (d) It shall be a complete defense to an action brought by a private party that a final judgment was entered in another action involving substantially similar alleged facts and that the judgment provided an injunction sufficient in scope to protect the public from the recurrence of the alleged violations of law and any additional equitable relief or other orders reasonably necessary under the facts and circumstances to redress the alleged violations of law.
- (e) A rebuttable presumption exists that a judgment obtained by a law enforcement agency provides the relief described in subdivision (d) if the court so indicated in the judgment. The law enforcement agency and its members may not involuntarily be called as witnesses or subject to Title 3 (commencing with Section 1985) of Part 4 of the Code of Civil Procedure in any proceeding to contest the presumption established by this subdivision.
- (f) Nothing herein affects the right, if any, of a private party to seek appropriate relief pursuant to Section 1021.



Law Revision Commission RECEIVED

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File:

September 19, 1995

TULO:4

Mr. Colin Wied Chairperson Mr. Stan Ulrich / Assistant Executive Secretary California Law Revision Commission 4000 Middlefield Road, Suite 2D Palo Alto, CA 94303-4739

Re: Staff Draft Tentative Recommendation, B-700, Unfair Competition

Dear Chairperson Wied, Mr. Ulrich and Members of the Law Revision Commission:

Consumers Union, the nonprofit publisher of Consumer Reports, wishes to compliment the Law Revision Commission on the careful work and analysis which has resulted in the current, and more limited, draft proposal relating to the procedure for unfair competition actions. The latest proposal is far preferable to the broader proposals which have been previously discussed by the Law Revision Commission. However, we still must suggest that the Law Revision Commission give careful consideration to whether the res judicata portion of the proposal, found at sections 385.34 and 385.36, is necessary. Many of the issues which have been identified in connection with Unfair Competition Actions, such as conflict between public and private cases or allegedly inadequate plaintiffs or counsel, are usefully addressed in other sections of the staff draft tentative recommendation. Those sections can operate in the absence of any res judicata provisions. There is much to be said for moving forward with the conflict of interest, adequacy of settlement, public registry, and perhaps the public/private stay provisions now, and revisiting the issue of res judicata in the future if, and only if, these provisions are inadequate after they have been fully implemented. If the Commission chooses this approach, it would adopt all of the staff draft tentative recommendation except sections 385.34 and 385.36.

1. Placement in the Code

It is appropriate to place these procedural prerequisites to filing an Unfair Competition Act complaint in the Code of Civil Procedure. Avoiding placing these provisions in the Unfair Competition Act itself should assist the Law Revision Commission to keep the legislation focused on the procedural issues. It should help to avoid the measure becoming a lightning rod for other proposals by a variety of special interests which may desire to reduce the effectiveness of the

Unfair Competition Act.

2. Section 385.22: Adequate Legal Representation

The staff draft tentative recommendation on the issue of adequacy of legal representation and absence of conflict of interest by the plaintiff is a useful provision. It should promote additional court scrutiny so that these actions are brought by attorneys who are qualified and by parties which lack a conflict of interest. At the same time, this draft, unlike earlier drafts, avoids interfering with the broad standing principles of Business and Professions Code Sections 17204 and 17525.

3. Section 385.24: Notice to the Attorney General's Register

We believe that the registry is valuable and that notice should be required to be given to the registry as well as to the attorney general. The registry will permit the media, the public and public interest organizations to monitor the filing, pursuit and settlement or judgment of unfair competition actions in California. It will provide the same opportunity to any regulatory agencies which do not receive direct notice of the actions. Notice to the Attorney General without notice to the public registry is not adequate to serve this goal. Unfortunately, the degree of commitment to the enforcement of consumer and environmental laws can change with changes in publicly elected law enforcement officials, budgetary restraints, and other factors unrelated to the merit of the cases. Therefore, the registry is necessary to encourage public interest groups and others to monitor the filing and development of cases in this area.

The notice requirement in section 385.24 does not suffer from the key drawback of mandatory prefiling notice requirements, in that it should not interfere with the ability to seek temporary restraining orders or preliminary injunctions because the notice requirement may be satisfied at the time of filing. This is preferable to a pre-filing requirement.

4. Section 385.26: Disclosure of Similar Cases by Defendant

The staff note to this section raises the question of what the consequences should be for a defendant's failure to comply with the requirement to disclose similar cases. If the <u>res judicata</u> approach of the draft is adopted, then it would be critical that the penalty for failure to disclose to include failure to achieve <u>res judicata</u> status for the judgment as against those parties who had pending cases and received no direct notice because the defendant did not disclose the existence of those cases.

- 5. If a defendant could achieve <u>res judicata</u> effect as to actions on behalf of the general public without either giving notice to the parties in those cases or disclosing the cases so that its opposing party could give notice, this would be a recipe for abuse of the statute. It would reward violation of the statutory disclosure obligation. It also could encourage defendants to "shop" among multiple cases to select the case which is least likely to be vigorously litigated, presented, and negotiated as the case to be taken to stipulated judgment.
- 6. Section 385.28: Notice of Terms of Judgment

The staff draft raises the question of the appropriate length of time for notice of the proposed terms of a judgment in a representative action. We suggest that the period not be any shorter than 45 days. If the Attorney General is likely to take a week or ten days to post the notice on its registry, then a 60 day period would be more appropriate.

In this section, the staff draft also raises the question of how a plaintiff might determine which regulatory agency, if any, must receive notice. The staff note legitimately points out that it can be difficult to determine whether any agency has jurisdiction and to identify all the agencies that may have jurisdiction over a particular practice or entity. One way to address this would be to require notice only to any state regulatory agency which has licensed the defendant entity. If the defendant entity does not have a state license, no regulatory notices would be required. Some defendants do hold multiple state licenses, but in those instances, for all of their licensing agencies may wish to receive notice of the allegations and proposed judgment against them.

Another way to provide certainty on the question of regulatory agency notice would be to provide a safe harbor so that the regulatory agency notice provision is satisfied if notice is given to those agencies which the defendant discloses to the plaintiff as its regulatory agencies.

We urge the Commission to leave in the text the reference in section 385.28(b) to "other interested person(s)." In our experience, other interested persons such as consumer organizations are sometimes the most effective potential objectors to an inadequate proposed settlement.

Whether or not the judgment will have <u>res judicata</u> effect as against other actions on behalf of the general public, the procedure for entry of judgment in an action brought on behalf of the public should permit and indeed encourage comment on the adequacy of the proposed judgment from the widest possible group. This will

include not only persons with other similar cases against the defendant, but also other interested persons. Those persons might include other persons with claims that have not yet been filed against the defendant, or watchdog public interest groups, or regulatory agencies which did not receive direct notice.

Section 385.30: Findings for Entry of Judgment.

Our comments in connection with this section mirror those above. In order to encourage public comment prior to entry of the judgment in an action on behalf of the public, this section should be expanded to include a requirement to permit comment by any person on the fairness or adequacy of the proposed judgment. That provision is now found in section 385.36(c). However, that section is more limited in its application and is not recommended for adoption by staff. We strongly urge the Commission to include in section 385.30 the requirement for the court to provide an opportunity to comment to any person objecting to the fairness or adequacy of a proposed judgment, and to consider those comments. That requirement is now found at section 385.36(c). Although current section 385.30 requires that the court find that the entry of the judgment be in the interests of justice, it does not explicitly require the court to accept or consider the comments of the public.

If the <u>res judicata</u> approach of section 385.34 is retained, then we urge that one additional change be made to section 385.30. That change is to add to that section - which would govern entry of all Unfair Competition Act judgments - the precondition now found only in section 385.36(d). That precondition is that the court may limit the scope of the <u>res judicata</u> effect before entering the judgment. If the Commission does recommend adding <u>res judicata</u> effect for these actions, it should at least recommend an explicit authorization for the court to first make an affirmative determination of the degree to which <u>res judicata</u> effect is desirable before it enters the judgment.

8. Section 385.32: Preliminary Relief

The staff notes pose the question of whether this section is necessary since the court has inherent equitable power to grant preliminary relief. Because of the additional procedural requirements being placed on unfair competition actions, we believe that it would be valuable to retain this section to ensure that there no legislative intent is created to restrict or limit the ability of the court to provide for preliminary relief in advance of completing the various new notices. Therefore, we recommend retaining section 385.32.

9. Section 385.34: Binding Effect of Representative Action

As discussed above, we appreciate the thoughtful narrowing that has gone in to the preparation of this section. However, we are not persuaded that this res judicata rule is really necessary to avoid the problems that have been alleged in Unfair Competition Act actions. The stay provision addresses the possibility of multiple ongoing actions. We believe that the court in the second case already has the inherent power to dismiss a second action on behalf of the public without a res judicata effect of the first case. Indeed, we recently briefed this issue in the Court of Appeal in Gray v. Safeway, arguing that the law of mootness would have permitted a dismissal of a second private action where an earlier public action provided all the benefits to the public which were sought in the second action.

10. Section 385.36: Binding Effect on Individual Claims

We are in general agreement with the staff recommendation that this section should not be adopted. However, we strongly urge that subpart (c) of this section be moved into the general requirements in section 385.30 for findings prior to approval of settlement or entry of judgment. If the Commission adopts the <u>resjudicata</u> approach, then subsection 385.36(d) also should be moved into section 385.30.

11. Section 385.40: Priority Between a Public Prosecutor and Private Plaintiff

With several changes, we would see this section as a balanced approach to the issue. We believe that the approach of this section is more likely to be workable and effective than the language proposed by the California District Attorneys Association Consumer Protection Committee on this point. The District Attorneys Association's proposal would provide for a stay of any private litigation until the law enforcement agency's proceedings are completed. Unfortunately, that proposal is not conditioned upon vigorous prosecution or upon timely completion of the public action. The staff draft tentative recommendation in section 385.40, by contrast, appears to permit a court to lift the stay of a private action in favor of a public action if the public action is not pursued in a timely fashion. We suggest, however, making this clearer in the staff draft by adding a third basis to overcome the presumption of preference for the public prosecutor. The new language would read, in substance: "385.40(b)(3) If the public prosecutor has not vigorously pursued the case, the presumption shall be overcome and the stay may be declined or lifted."

The second change we suggest in this section is to clarify that the stay under section 385.40 is discretionary rather than mandatory. We suggest this be addressed at section 385.40, line 10, by eliminating the language, "shall determine which action should proceed and shall stay the other action" and replacing this language with, "shall determine whether one of the actions should be stayed, and if so, shall stay that action after notice and opportunity to be heard by all affected parties."

Finally, the stay section also should be restricted to cases concerning similar time frames and geographic areas. On the face of the language of section 385.40, a court could stay a private action suing a defendant for activity in San Diego because a district attorney in Fresno had sued to stop the same conduct in its jurisdiction. Although this may not have been the intent of the language, it could be best avoided by adding at line 9 after "substantially similar facts and theories of liability," a phrase such as "in a similar time frame and in similar geographic areas."

12. Section 385.42: Attorneys Fees

We support this section. We believe that it will reduce the disincentive to develop private cases (which can deter illegal behavior) that otherwise would be caused by the notice and possibility of stay of a private action in preference to the public action.

Conclusion

We respectfully suggest that the Commission consider adopting the elements of the staff draft tentative recommendation without the two <u>res judicata</u> sections (sections 385.34 and 385.36), and revisit the issue in a few years if those new sections are found to be insufficient to reduce or eliminate the problems which have been alleged concerning Unfair Competition Act actions.

The new procedural rules would be quite substantial even without added <u>res judicata</u>. They would include:

- 1) an affirmative judicial inquiry into conflict of interest and adequacy of counsel;
- 2) notice to the registry of both filing and proposed settlement or judgment;
- 3) notice of settlement or proposed judgment and a fairness type hearing with notice to other parties and to a public registry, with an opportunity for public comment:
- 4) authority for stay where necessary due to multiple actions; and

5) preservation of the ability of private attorneys who develop cases to secure attorneys fees for work done before a stay.

We respectfully suggest that the Law Revision Commission adopt these elements of the staff draft tentative recommendation, with the recommended modifications to the stay section, while omitting the more radical <u>res judicata</u> sections until these other procedural improvements have had a chance to work. We look forward to discussing these issues with the Commission at its September meeting.

Very truly yours,

Gail Hillebrand

GKH:sw

LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE BUREAU OF SPECIAL OPERATIONS • CONSUMER PROTECTION DIVISION

GIL GARCETTI • District Attorney
SANDRA L. BUTTITTA • Chief Deputy District Attorney
R. DAN MURPHY • Assistant District Attorney

ROBERT P. HEFLIN . Director

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September 23, 1995

Colin W. Wied, Chairperson Stan Ulrich, Assistant Executive Secretary California Law Revision Commission 4000 Middlefield Road, Suite D-2 Palo Alto, California 94303-4739

Re: Study B-700 -- Unfair Competition

Dear Chairperson Wied, Mr. Ulrich and Members:

I write once again on behalf of the California District Attorneys Association Consumer Protection Committee, as well as my own office, to provide further information on the views of public enforcement officials regarding the Commission staff's September 8 draft tentative recommendation on the unfair competition statute. The views of dozens of district attorneys, city attorneys and deputy attorneys general in our membership are incorporated here.

Once again we thank the Commission and staff for your kind consideration of the views of the law enforcement community in this regard. We have a consensus on a few proposed amendments to the September 8 draft, and these follow.

Background to Proposed Amendments

Changes to the unfair competition statute are of vital concern to every California prosecutor's office. More than simply another private remedy, Bus. & Prof. Section 17200 is California's "Little FTC Act" -- the principal law enforcement tool used by California prosecutors to protect the public from unfair and deceptive business practices. See People v. National Association of Realtors (1981) 120 Cal.App.3d 459; People v. Pacific Land Research (1977) 21 Cal.3d 683.

In consumer fraud and antitrust enforcement, Section 17200 is more important to us than the Penal Code. We appreciate your efforts to avoid hampering legitimate law enforcement uses of this statute, which has served California so well over the years.

As we indicated in our letter of June 28, the issue of standing to represent the "general public" (see Section 17204), and the related issue of finality in the context of public and private litigation, merit the attention of the Commission, even though problems in this area arise infrequently. We believe this clarification can be achieved through careful draftsmanship, and we applaud the efforts of the staff in this regard. The September 8 Staff Draft Tentative Recommendation greatly advances the discussion and we agree with much of its approach.

However, we believe it is important to distinguish more clearly between public law enforcement actions -- which are brought in the name of the People of the State of California -- and private actions brought by private persons acting on behalf of themselves and the "general public."

Law enforcement actions under Section 17200 are brought by the State of California in its sovereign capacity; these actions serve many of the same functions (including deterrence, punishment and restitution) as criminal prosecutions under the Penal Code.

Private actions under Section 17200 take two forms: Some such suits are brought by a single plaintiff to obtain an injunction or recovery for the plaintiff's individual loss. Others -- the "general public" actions the staff has titled "representative actions" -- seek injunctions and restitution for many individuals.

The vast majority of the cases which have caused concern are the private "follow-on" lawsuits on behalf of the "general public," usually following public actions that defendants hoped would be conclusive. On the other hand, we are unable to identify a single case of a "follow-on" law enforcement action impeding a legitimate private action on behalf of the general public. Indeed, public prosecutors essentially never spend scarce resources by challenging a practice that has already been litigated and stopped. Although we address that possibility in our proposal, the difference in the pattern of problems here is yet another reason for different treatment of the public and private actions.

There are three aspects of the current draft recommendation for which we would suggest amendments: (1) the definition of "representative action," (2) the res judicata provision, and (3) the public/private priority provision.

Defining "Representative Action"

The present draft defines the term "representative action" which is key throughout the balance of the text. "Representative action" means "a cause of action on behalf of the general public

under Section 17204 or 17535" (Section 385.10(d).) This definition may cause confusion for those not familiar with the distinction between these "general public" actions and actions brought in the name of the People by prosecutors.

California public prosecutors do <u>not</u> bring "representative actions" as the staff has defined them, or indeed at all.
Rather, California prosecutors bring only <u>law enforcement actions</u> in the name of the sovereign, the People of the State of California, under the first clause of Section 17204 (see also Section 17206(a)). Prosecutors do not act in a "representative" capacity (in the sense meant by the staff) but only as counsel for the People as sovereign (<u>see also</u> Penal Code sec. 684). Thus to our knowledge prosecutors have never brought actions under the "general public" clause of Section 17204 that is the real issue before the Commission.

To be sure, injunctive relief and restitution/disgorgement can be obtained by both parties (the People and a private plaintiff acting in a representative capacity). And we are proposing means of addressing each kind of case. But to avoid potential confusion and ambiguity, it would be best to differentiate clearly between <u>private</u> "general public" actions and <u>public</u> "People" actions. This can be accomplished easily by inserting the term "private" in Sec. 385.10(d) and elsewhere, as we have proposed in the attached draft revisions.

Res Judicata Provision

The present draft recommendation includes a res judicata provision, Section 385.34 (binding effect of representative action), which declares the determination of a "representative action" to be "binding and conclusive on all persons." This proposal attempts a single rule for all public and private actions in this context, although Prof. Fellmeth recommended a two-part rule distinguishing public and private cases.

We share the staff's desire for simplicity and brevity, but the combined rule in its present form is likely to cause confusion.

If by use of "representative cause of action on behalf of the general public" the staff is proposing to bind only those actions using the "general public" standing provision of Sections 17204 and 17535, then this provision will only apply to private litigants, as prosecutors never use the "general public" standing provision. If this is so, it should be clarified.

However, if this version of Section 385.34 is intended to bind <u>all</u> persons -- even prosecutors bringing subsequent law enforcement actions for uniquely public sanctions -- then the proposal is a substantial deviation from sound public policy in California. Public policy in this and other states has

consistently treated law enforcement actions distinctly from private damage actions precisely because the two actions serve very different policy concerns.

This may be seen clearly by analogy. Prosecutions for grand theft under Penal Code Section 484/487.1 serve different purposes (including deterrence and punishment) than actions by private victims to recover damages for fraud on the contract or wrongful conversion. While individual private parties, as "victims" under the California Constitution (Art. I, sec. 28) and certain Penal Code provisions, have a right to restitution for losses suffered as a result of criminal activity, private attempts at that restitution are legally subordinate to the public enforcement action (and set-offs are provided for, see Penal Code Sections 1202.4(e) and (h)).

Criminal prosecutions and judgments are never stayed or barred in deference to private civil actions which might arise out of the same facts. To do so would allow private litigants, acting for their own interests, to determine when and how the People as a whole should act in their sovereign capacity to protect the public. Only the sovereign is permitted to seek penalties such as incarceration and fines, or here civil penalties under Section 17206. A private action for restitution and/or injunctive relief should not bar a public law enforcement action, especially for those public remedies (such as Section 17206 civil penalties and public agency costs) which the private action cannot obtain.

However, there is an overlap in the remedies of public and private actions under Section 17200 as to injunctive and restitutionary relief under Section 17203. Without unduly interfering with the unique prosecutorial function, there should be a means of providing finality and avoiding duplicative actions with regard to those overlapping remedies.

Where one or more private "general public" actions exist, the staff rightly suggests that one must be selected and accorded finality. And where a public enforcement action under Section 17200 has been brought and all appropriate remedies have been obtained, private defendants have a reasonable interest in knowing that the matter is likewise final.

To better serve all these legitimate policies, we propose the attached amendments to current Section 385.34. Sub-paragraphs (a) and (b) remain, but are clarified to apply as a bar only to "any action brought by a <u>private</u> person on behalf of the general public." This provides finality as to "general public" private claims — the primary source of concern for the Commission. (As a footnote, you may also wish to change the word "damage" in sub-paragraph (b), as "damages," strictly speaking, are not recoverable under Sections 17200 or 17535 (Bank of the West v. Superior Court (1992) 2 Cal.4th 1254).)

However, in order to fairly address the "public/private" finality concern, we propose to add sub-paragraphs (c) and (d). This proposal provides that, where the People have already acted, two provisions apply to subsequent private "general public" actions:

- The defendant(s) have a complete defense to the substantially similar private action if the public judgment obtained appropriate injunctive and other relief;
- A rebuttable presumption of the sufficiency of the public judgment shall exist if so indicated by the court in the public judgment.

If the "general public" has already been well served by a public enforcement action, a defendant should be able to assert this as a complete defense to subsequent redundant private actions.

Thus our proposal addresses both the "private/private" and the "public/private" redundancy scenarios, and avoids problems associated with combining the two issues in one provision.

Priority Between Public Prosecutor and Private Plaintiff

The present proposal, at Section 385.40, provides for a system for establishing priority between public and private plaintiffs in cases of "conflicting claims to represent the general public." A presumption is provided in favor of the prosecutor, but this may be rebutted on showing of a specified conflict of interest or an inadequacy of "the resources and expertise" of the prosecutor.

Once again, the definition of "representative action" is important here. If this provision only applies to "general public" actions, there will never be "conflicting claims to represent the general public" as prosecutors never bring actions on that basis. But we assume this proposal was intended to establish priority for a broader class of Section 17200 claims, and the present draft poses problems for the law enforcement community.

As discussed above, law enforcement actions brought in the name of the People of the State of California (or those actions brought by any other state, or by the United States government), do not trail or yield to private actions arising out of the same conduct and events. At most in California, private plaintiffs' recoveries are off-set by restitution ordered, under the Penal Code sections cited above.

This general primacy for law enforcement actions is grounded on solid principles of public policy. The Attorney General and the local District Attorneys are Constitutional public officers, elected and periodically evaluated by all the citizenry, and forbidden by law and ethics from personal pecuniary gain from

their prosecutions. Private plaintiffs are expected to pursue such private gain on behalf of their clients and themselves, and have no such system of democratic checks and balances.

This is not to say that it is impossible for a public enforcement official to act unwisely; rather, that there is an effective system of checks to prevent such abuse. Importantly, there is no evidence of such problems in Section 17200 enforcement. No one before the Commission or elsewhere has been able to cite a case of a bad faith public prosecutor intervening to forestall a good faith private Section 17200 action. This is not merely a result of chance: The Attorney General would have to join in any such bad faith action by a local prosecutor to give the matter statewide effect; the inherent checks involved in two elected officials publicly betraying the interests of a large class of voting consumers are obvious and effective.

The public has a right to have its business take precedence. It does, for example, in the criminal enforcement process, and in the allocation of criminal and civil Superior Courts. This principle should apply to consumer fraud matters as it does to virtually all other such public/private conflicts.

In addition, the current version of Section 385.40 might give rise to serious practicality and enforceability problems. It is possible that there is a separation of powers problem in allowing a judicial branch of government to bar the executive branch of government from filing or pursuing actions to enforce otherwise valid state laws. And the proposed sub-paragraph (b)(1) is arguably duplicative of state law today (see People ex rel. Clancy v. Superior Court (1985) 39 Cal.3d 740 (prosecutors already disqualified if conflict of interest exists).

But more troubling is the comparative resources/expertise process in sub-paragraph (b)(2). This provision is unprecedented in its attempt to require a public prosecutor to justify that it is competent to enforce state law. It would seem to invite strange "law office quality pageants" where discovery as to resources and expertise would take place and then resource-intensive hearings on comparative superiority or adequacy would ensue.

Our alternative has already been reflected in the present draft at p.8, note 4. This proposal provides that in matters brought by a private party acting for the "general public," the private action shall be stayed, upon the prosecutor's application, until the final judgment is reached in the public action. This reflects the larger tradition in the Anglo-American legal system of precedence for law enforcement actions brought by elected public representatives. Importantly, this is not a bar or estoppel provision. The private action would proceed once the public judgment is entered. Our proposal simply says: "The public's work comes first; the private interests may proceed thereafter." This sequence works well in most other areas of public/private litigation; it is unclear why we should deviate from that tradition here.

We invite your consideration of this proposal and welcome an opportunity to continue to provide input into your analysis of the important law enforcement statute. More detailed analysis of these and related issues will be provided as you might wish.

Thank you once again for your consideration of our views.

Best regards,

GIL GARCETTI

District Attorpey

THOMAS A. PAPAGEORGE, Head Deputy

Consumer Protection Division

Chair, Legislative Subcommittee, CDAA Consumer Protection Committee

ATTACHMENT 1: PROPOSED AMENDMENTS

§385.10. Definitions

- 385.10. as used in this chapter:
- (a) "Private plaintiff" means a person other than a public prosecutor.
- (b) "Public prosecutor" means the Attorney General or appropriate district attorney, county counsel, or city prosecutor.
- (C) "Representative action" means an action that includes a representative cause of action.
- (d) "Representative cause of action" means a cause of action brought by a private plaintiff on behalf of the general public under Section 17204 or 17535 of the Business and Professions Code.

§385.20. Prerequisites for pleading representative cause of action

- 385.20. (a) A private plaintiff may plead a representative cause of action on behalf of the general public under Section 17204 or 17535 of the Business and Professions Code only if the requirements of this chapter are satisfied.
- (b) The <u>private</u> plaintiff shall separately state the representative cause of action in the pleadings, and shall designate the cause of action as being brought "on behalf of the general public" under Section 17204 or 17535 of the Business and Professions Code, as applicable.

§385.26. Disclosure of similar cases against defendant 385.26. Promptly after a representative action is filed, the

defendant shall disclose to the <u>private</u> plaintiff and to the court any other cases pending in this state against the defendant based on substantially similar facts and theories of liability.

§385.28. Notice of terms of judgment

- 385.28. (a) At lease [45] days before entry of a judgment in the representative action, or any modification of the judgment, which is a final determination of the representative cause of action, the <u>private</u> plaintiff shall give notice of the proposed terms of the judgment or modification, including all stipulations and associated agreements between the parties, together with notice of the time and place set for agreements between the parties, together with notice of the time and place set for the hearing on entry of the judgment or modification, to all of the following:
- (1) Other parties with cases pending against the defendant based on substantially similar facts and theories of liability.
- (2) The Attorney General for publication in the register of representative actions under Government Code Section 12660.

- [(3) Any regulatory agency with jurisdiction over the defendant relevant to the allegations in the pleadings.]
- (b) A person given notice under subdivision (a) or any other interested person may apply to the court for leave to intervene in the hearing provided by Section 385.30. Nothing in this subdivision limits any other right a person may have to intervene in the action.

§385.34. Binding effect of representative action

- 385.34. (a) Except as otherwise provided in subdivision (b), the determination of a representative cause of action on behalf of the general public in a judgment approved by the court pursuant to Section 385.30 in binding and conclusive on all persons. in any action brought by a private person on behalf of the general public.
- (b) A person who commences an action based on damage to the person individually, as distinguished from a cause of action in a representative capacity is not bound by the judgment on the representative cause of action except that any monetary recovery awarded to the person individually shall be reduced by the amount of any monetary recovery the person received as a result of the representative action.
- (c) It shall be a complete defense to a representative action brought by a private party that a final judgment in an action brought by a law enforcement agency was entered in another action involving substantially similar alleged facts and that the judgment provided an injunction sufficient in scope to protect the public from the recurrence of the alleged violations of law and any additional equitable relief or other orders reasonably necessary under the facts and circumstances to redress the alleged violations of law.
- (d) A rebuttable presumption exists that a judgment obtained by a law enforcement agency provides the relief described in subdivision (c) if the court so indicated in the judgment. The law enforcement agency and its members may not involuntarily be called as witnesses or subject to Title 3 (commencing with Section 1985) of Part 4 of the Code of Civil Procedure in any proceeding to contest the presumption established by this subdivision.

§385.42. Attorney's fees

- 385.42 (a) In addition to any other applicable factors, any award of attorney's fees in a representative action shall be based on the work performed, the risk involved, and a consideration of benefit conferred on the general public.
- (b) If a public prosecutor is given preference over a private plaintiff under Section 385.40 the private plaintiff may be

entittled to costs and attorney's fees pursuant to Section 1021.5 of other applicable law.

(b) Timely notice by the attorney for the private plaintiff of a planned or filed representative action and assistance to the public prosecutor shall be relevant in meeting the requirement of beneficial contribution under Section 1021.5. Where beneficial contribution has occurred, the private plaintiff need not have been the successful party in order to qualify for an attorney fee award under Section 1021.5.

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JAN T. CHILTON

DIRECT DIAL (415) 677-5603

September 26, 1995

Mr. Nathaniel Sterling Executive Secretary California Law Revision Commission 4000 Middlefield Road, Suite D-2 Palo Alto, CA 94303-4739

Re: Unfair Competition Study B-700

Dear Mr. Sterling:

Thank you for sending me a copy of the latest draft of the proposed statute concerning unfair competition litigation. Will Stern and I have reviewed it and have the following comments:

- 1. The draft is a great improvement over prior proposals. The idea of splitting res judicata effects as to the general public from those affecting the right to individual recovery is a good, innovative solution to a difficult problem.
- 2. Proposed section 385.22 needs further definition of "adequate legal representative" and "conflict of interest." Neither term has a self-evident meaning, and courts will need to know what they are supposed to be looking for in determining whether the action can proceed on behalf of the general public.
 - a. "Adequate legal representative" might be defined as being the same standard applied to determine whether a plaintiff can adequately represent the class, or it might be defined as showing sufficient knowledge, experience, resources and ability to prosecute the case vigorously on behalf of the class.
 - b. "Conflict of interest" will probably be much harder to define. But definition of that term is crucial because so many different notions of "conflict of interest" are used by lay people as well as lawyers

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Mr. Nathaniel Sterling Executive Secretary California Law Revision Commission September 26, 1995 Page 2

and judges. At the Law Revision Commission meeting I attended, Professor Fellmeth, I believe, suggested that a plaintiff would have a "conflict of interest" if the plaintiff pursued substantial causes of action on his or her own behalf as well as the 17200 claim on behalf of the general public. If that notion is correct, it certainly should be explained in the statutory language, since I do not believe many lawyers or judges would reach that conclusion just from the words "conflict of interest." Is a "conflict of interest" raised when the plaintiff has a significant personal financial stake in the outcome of the litigation, so that the plaintiff might be willing to bargain away the public's right for his or her personal gain? Does an organization like Consumers Union have a "conflict of interest" because it pursues goals that are broader than and perhaps different from simple success in the litigation so that it might be willing to settle a case to advance those goals at the expense of greater restitution or other relief in the case itself?

- c. Should a court allow discovery regarding "adequate legal representative" and "conflict of interest" before making its determination?
- d. The proposed statute should also address what effect the filing or "certification" of a representative action has on the statute of limitations for individual suits for damages. Under section 385.34(b), individual actions would not be barred by res judicata, but they might be barred by the statute of limitations if not filed while the representative action was pending. Perhaps, the statute of limitations should be stayed pending resolution of the representative action by analogy to the similar tolling of the statute of limitations for class members under certain circumstances. (See Becker v. McMillan Construction Co. (1991) 226 Cal.App.3d 1493.)
- 3. Proposed section 385.22 should also specify that when a court determines that a case cannot be maintained on behalf of the general public, the action is no longer a "representative action" for purposes of the remainder of the proposed new statute so that the notice and settlement provisions no longer apply. Alternatively, the definition of "representative action" in section 385.10 could be changed to exclude actions in which a determination has been made that the action cannot be brought on behalf of the general public.

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Mr. Nathaniel Sterling Executive Secretary California Law Revision Commission September 26, 1995 Page 3

- 4. Some thought should be given, and some language should be added, to specify the manner of appellate review of the determination that an action can or cannot be maintained on behalf of the general public. Is a determination that the action cannot be maintained on behalf of the general public to be treated as a "death knell" order, thus being immediately appealable as an order denying class certification? Or is the determination reviewable only by a petition for extraordinary writ prior to entry of final judgment? Or is some other review pattern desirable?
- 5. The statute should also specify whether the plaintiff will be allowed to obtain any ruling involving the merits (such as summary judgment or preliminary injunction) before obtaining a determination as to whether the action may be maintained on behalf of the general public. Generally, in class actions, certification must precede any ruling on the merits to avoid the problems of one-way intervention. (See Home Sav. & Loan Assn. v. Superior Court (1975) 54 Cal.App.3d 208; Home Sav. & Loan Assn. v. Superior Court (1974) 42 Cal.App.3d 1006.) For the same reason, the same rule should be adopted by statute for actions on behalf of the general public. There also should be some coordination of this concept with section 385.32 regarding preliminary injunctions.
- 6. Some thought should be given to coordinating the notice provisions of section 385.24 with notice requirements of other statutes that might govern claims a plaintiff would join with a 17200 claim in a single suit. For example, Proposition 65 requires pre-suit notice. When there are two notice requirements for two different claims in a complaint, must the plaintiff give two notices? Or will only one suffice?
- 7. Public prosecutors should be required to file a similar notice with the Attorney General so that private citizens will be notified of such suits. This will serve two important functions: First, it will tend to discourage duplicate filings of actions by private plaintiffs on behalf of the general public. Duplicate private suits may be eliminated later under section 385.40, but only after considerable expense to both sides, an expense that could be eliminated by simply requiring public notice of the public suit. Second, public notice will allow those affected by the alleged practice to monitor the public suit so as to preserve their rights against possible prejudice by a settlement benefiting the public prosecutor at the individual victim's expense, as in People v. Superior Court (Good) (1976) 17 Cal.3d 732.

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Mr. Nathaniel Sterling Executive Secretary California Law Revision Commission September 26, 1995 Page 4

- 8. Sections 385.28 and 385.30 (requiring public notice and findings before entry of judgment in a representative action) should be amended to make it clear that they apply only to judgments to be entered pursuant to settlement or voluntary dismissal. If the case goes to trial, public notice and findings are not needed to protect the public interest, and giving notice would serve no purpose since public comments post-trial would not change the judgment which the court has determined to enter, based on the law and facts adduced at trial.
- 9. Sections 385.28 and 385.30 should apply to 17200 actions brought by public prosecutors as well as to private representative actions. As *People v. Superior Court (Good)* (1976) 17 Cal.3d 732 illustrates, public prosecutors have their own agendas and interests that are not always the same as those of the victims of an unfair practice. The "county bounty" in particular gives public prosecutors an incentive to require the wrongdoer to pay the public treasury rather than victims. The notice and findings requirements of these sections would go a long way to assuring that the public prosecutor is properly looking out for the victims as well.
- 10. Under section 385.34(b), an individual would not be bound by the results of the representative action in seeking damages on his or her own behalf. By the same token, the individual should not be able to claim the benefits of collateral estoppel based on the results of the representative action. In the same way, persons who opt out of a class action are not bound by the judgment in the class action but cannot claim the benefits of collateral estoppel based on the class action judgment. (E.g., Premier Elec. Constr. Co. v. National Elec. Contractors Assn. (7th Cir. 1987) 814 F.2d 358.) The statute should expressly adopt this rule for representative actions to even the playing field.
- 11. Section 385.36 ought to be dropped. If the defendant wishes to bind individuals so that they cannot later file individual suits for damages, the law already provides a perfectly well understood and available means of doing so: a true class action. Rather than inventing a whole new scheme with new problems, the statute should simply allow the defendant to rely on the existing available remedy. If the plaintiff won't agree to joining a harmed plaintiff and getting a class certified, then there will be no settlement or the settlement terms will have to be modified.
- 12. I think section 385.40 unduly favors public prosecutors. It will be virtually impossible for a private plaintiff to make the showing required by

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Mr. Nathaniel Sterling Executive Secretary California Law Revision Commission September 26, 1995 Page 5

that section particularly since most of the facts (such as what resources and expertise the public prosecutor has) are solely within the public prosecutor's knowledge. Or is the private plaintiff able to conduct discovery as to those facts? Once again, "conflict of interest" requires definition. Is the "county bounty" a "conflict of interest"?

13. Section 385.42 should be redrafted to match Code of Civil Procedure section 1021.5 better. Section 1021.5 does not mention either "successful party" or "beneficial contribution" both of which are used in section 385.42(c). If private attorney general fees can be paid to private parties who are not "successful," is there any restriction on when fees can be awarded, or is the court free to award fees whenever it finds the private plaintiff has contributed something to the public suit? I think some greater hurdle to fee awards should be erected.

Sincerely yours,

Jan Chilt

Jan T. Chilton

PS. After I prepared this letter, I received a copy of the letter submitted on this proposal by Gail Hillebrand of Consumers Union. Much she has to say is helpful and constructive. Her suggestion that the Commission delete the sections regarding res judicata effect is not. Deleting the res judicata sections would gut the proposed legislation of its principal benefit, leaving unsolved the principal problem which was identified in Professor Fellmeth's study and which the legislation was intended to address. Mootness would not bar a second suit, as Ms. Hillebrand suggests, unless all available relief had been granted in the first suit, something that will not occur if the first suit is settled. Nor will the proposed legislation's limited stay of private representative actions help; it will only postpone the problem, and then only when the "first" suit is brought by a public prosecutor rather than another private plaintiff.

Law Offices of S. Chandler Visher Union Square

240 Stockton Street, Fourth Floor San Francisco, CA 94108 (415) 391-0222 FAX (415) 291-3514 September 27, 1995

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California Law Revision Commission BY FAX ONLY

Re: B & P 17200 & 17500 Revisions

Dear Commissioners:

I have worked as a DA consumer fraud prosecutor for four years and a private attorney general on 17200 issues for 15 years. Please consider the following comments in connection with the proposed changes in the unfair business practice laws.

COMMENTS ON STAFF DRAFT UNFAIR COMPETITION LITIGATION 9/8/95

Section 385.40 - Civil Penalties Distinguish Public From Private Prosecutor

Unmentioned in Memorandum 95-43 is probably the key to the difference in roles of the public and private prosecutors from a practical standpoint: the public prosecutor can get penalties which go into the public coffers; the private prosecutor can only get restitution. Both, of course, can get an injunction. The public prosecutor has an *inherent conflict* between an interest in putting money in the public coffers, which pays staff salaries, and restitution to the public. The cable television settlement in San Diego earlier this year, with which Bob Fellmeth was involved, is a good example of this conflict. The DA settlement money went into the county coffers and helped public schools. I don't think there was any restitution to the public. A class action is pending on the damages issue, but the DA certainly was not looking primarily for restitution to the public.

With this conflict in mind, when separate actions are filed the public prosecutor might be presumed to be the better representative with respect to injunctive relief in all cases and with respect to restitution relief in those cases where the public prosecutor does not seek a civil penalty. If the public prosecutor seeks a civil penalty, the private prosecutor should be presumed to be the better representative on the restitution issue. The cases should be coordinated with the private plaintiff's interest limited to the restitution issue rather than having the private case stayed.

The requirement that the public prosecutor is required to have a substantial conflict of interest is impossible to meet unless a provision is added that such conflict is presumed

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to exist in any case where the public prosecutor seeks civil penalties for itself and restitution for the general public.

385.28 Notice of Terms of Judgment & 385.30 Findings Required

These provisions may not be a bad idea for a big case, but not all 17200 cases warrant such a cumbersome procedure. For example, I have just settled a small 17200 case against a Marin County title company involving a practice that went on for about a year ending in 1989. We have agreed to prospective relief of lowering fees for the title company's customers and attorney fees, which probably will be in the neighborhood of \$30,000. The statute has run on other similar claims and if I thought there was enough money to be gained in restitution I would go to the trouble of doing it myself. These procedures in such a case would just be a big waste of time and money.

The procedures in these sections should be optional when one of the parties wants the preclusive effect they provide for. If the attorney general is given a copy of the complaint in the first place, then it could also mandate that these procedures be followed by motion. Making this procedure mandatory will just muck up the system without serving much purpose.

If notice is going to have to be given to regulatory agencies, defendant should be required to tell plaintiff which agencies regulate it.

385.26 Disclosure of Similar Cases Against Defendant

The way this is worded it does not provide the plaintiff with the information needed to meet the hearing notice requirements, even if the defendant complies. The defect in the wording is that the defendant is required to tell the *new* plaintiff about the old case, but is not required to tell the *old* plaintiff about the new one. When it comes time for the 385.28 and 385.30 notices, then, the plaintiff does not know about cases filed after the case giving notice was filed but before the notice goes out.

At the end of 385.2 language such as "and the defendant shall thereafter give notice to the plaintiff of any case filed for which defendant is required to give notice pursuant to this section of the pendency of this action" needs to be added.

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385.22 Adequate Legal Representation

The statute does not define how the attorney becomes an "adequate legal representative." If the idea is to have the plaintiff's attorney meet the same requirements as if it was class action, why not just say so? There is plenty of law on that standard and no need to start a whole new bunch of cases on whatever is meant by this language.

385.34 Binding Effect of Representative Action

Unless the stay provisions of DA actions is changed as suggested above, this section can be dangerous. The DA action might give nothing to the class but still preclude any recovery on their behalf. In most such cases it is essentially impossible for individual members of the public to prosecute individual actions, so the ability to do so is meaningless. At a minimum this section should only apply to DA cases when there has been an order of restitution and the court has made a finding that a private action seeking damages and restitution would likely not have obtained more restitution/damages for the class than the DA case.

12660 Establishment of representative action register

This is not a bad idea, if it is really kept up and provides meaningful information. I was involved in a statewide effort in the late 70's to have a computerized database of complaints, but we found that it was not really a useful idea because prosecutors did not make use of the information. I suspect that the AG won't really pay much attention to such a register and it will founder. Maybe a limitation such as only actions that affect persons in at least three counties and 10,000 people or something would limit the list to cases that people really cared about.

I have a prior commitment at 2:00 PM but will attempt to appear at your meeting on Thursday the 28th by 3:00 PM in the hope you are still considering this matter. Thank you for your consideration of my thoughts.

Very truly yours,

S. Chandler Visher

UNFAIR COMPETITION LITIGATION

California law provides broad remedies for unfair business practices. Actions may be brought by public prosecutors and by private individuals or groups suing on their own behalf or on behalf of the general public. The open-ended standing provision has the potential for abuse and overlapping actions. This recommendation proposes several procedural improvements to promote finality and resolve conflicts among plaintiffs.

8 BACKGROUND

California law prohibits any "unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Originally a business tort remedy between disputing commercial entities, the unfair competition law² is now a primary tool for vindicating consumer or public market abuses by business entities in a host of situations. As it has been developed through years of court interpretation and legislative amendment, the California statute has become probably the broadest such statute in the country. Use of the unfair competition law as a remedy for specific harms to consumers should not obscure the role the statute plays in shaping the marketplace by restraining business practices that would otherwise drive the market to its lowest common denominator. To the extent that unfair practices confer a competitive advantage on an enterprise, competing businesses will find themselves at a disadvantage if they do not adopt similar measures.

^{1.} Section 17200 (defining "unfair competition"). The definition also includes "any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code" which contains general prohibitions on false advertising (Section 17500) and a host of special statutes applicable to charitable solicitations, telephonic sellers, products made by the blind, travel promoters, travel sellers, motel rate signs, American Indian-made articles, vending machines, water treatment devices, and environmental representations. The false advertising provisions in Section 17500 *et seq.* are subject to their own remedial provisions (Section 17535-17536.5), but are also swept up in the definition of unfair competition in Section 17200.

Parts of this discussion are drawn from the background study prepared by the Commission's consultant, Professor Robert C. Fellmeth, *California's Unfair Competition Act: Conundrums and Confusions* (photocopy 43 pp., 1995) (on file with California Law Revision Commission).

All further statutory references are to the Business and Professions Code, unless otherwise indicated.

^{2.} As used in this text, "unfair competition law" refers generally to the prohibitions and remedies provided in Business and Professions Code Section 17200 *et seq.* and Section 17500 *et seq.*, with particular reference to the remedies provided in Section 17204 and 17535. Unfair competition should be taken to include the false advertising statutes in Section 17500 *et seq.* unless the context indicates otherwise.

^{3.} See Fellmeth, *supra* note 1, at 4. For additional background on the history of these statutes, see Note, *Former Civil Code Section 3369: A Study in Judicial Interpretation*, 30 Hastings L.J. 705 (1979). Business and Professions Code Sections 17200-17208 are the successors of Civil Code Section 3369.

^{4.} See overview of federal and other states' law in Fellmeth, supra note 1, at 7-19.

^{5.} See Fellmeth, *supra* note 1, at 19-21.

The remedies provided in the unfair competition law have extensive application as a cumulative remedy to other statutes.⁶ The unfair competition law applies whenever a business act or practice violates any statute,⁷ not just specifically referenced statutes in the Business and Professions Code. Moreover, the statute applies to acts and practices of unfair competition that are not in violation of any specific statute — the plaintiff need only show that members of the public are likely to be deceived.⁸

The broad scope of the unfair competition law is matched by its standing rules. Relief may be sought by a large number of public officials:⁹ (1) the Attorney General, (2) all district attorneys, (3) county counsels authorized by agreement with the district attorney in cases involving violation of a county ordinance, (4) city attorneys of cities with a population over 750,000,¹⁰ and (5) with the consent of the district attorney, city prosecutors in cities with full-time city prosecutors. The unfair competition law may permit enforcement by a public prosecutor even where the underlying statute provides different enforcement authority.¹¹

In addition, actions may be brought by private parties acting for themselves or in the interests of the general public.¹² As in the case of public prosecutors, the unfair competition law provides private plaintiffs a right to sue on behalf of the general public even where the statute allegedly violated by the defendant provides no right of action.¹³

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^{6.} See Sections 17205, 17534.5.

^{7.} See, e.g., People v. McKale, 25 Cal. 3d 626, 631-32, 602 P.2d 731, 159 Cal. Rptr. 811 (1979); Barquis v. Merchants Collection Ass'n 7 Cal. 3d 94, 111-13, 496 P.2d 817, 101 Cal. Rptr. 745 (1972). If conduct is expressly permitted, however, the unfair competition law does not provide a remedy. Hobby Industry Ass'n of America v. Younger, 101 Cal. App. 3d 358, 369, 161 Cal. Rptr. 601, 608 (1980).

^{8.} See Sections 17200, 17203; Committee on Children's Television, Inc. v. General Foods Corp., 35 Cal. 3d 197, 211, 673 P.2d 660, 197 Cal. Rptr. 783 (1983); Chern v. Bank of America, 15 Cal. 3d 866, 876, 544 P.2d 1310, 127 Cal. Rptr. 110 (1976). The scope of this rule is not unlimited. *See* Rubin v. Green, 4 Cal. 4th 1187, 1203-04, 847 P.2d 1044, 17 Cal. Rptr. 2d 828 (1993) (broad scope of unfair competition law does not override litigation privilege).

^{9.} Section 17204. The false advertising statute does not contain all of the limitations on authority of county counsels and city attorneys provided in the unfair competition statute. *Compare* Section 17204 *with* Section 17535. The rules applicable to city attorneys generally apply to the city attorney for the City and County of San Francisco. But see Section 17206(e).

^{10.} Sections 17204.5 and 17206.5 provide a special rule applicable to the San Jose city attorney that is now obsolete because the city's population exceeds 750,000.

^{11.} People v. McKale, 25 Cal. 3d 626, 631-32, 602 P.2d 731, 159 Cal. Rptr. 811 (1979).

^{12.} The specific language of Sections 17204 and 17535 is: "upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public." While in context, this language is susceptible of a different meaning (that the private plaintiff may complain to the appropriate public prosecutor), it is well-settled that private plaintiffs may sue for themselves or in a representative capacity. *E.g.*, Barquis v. Merchants Collection Ass'n, 7 Cal. 3d 94, 110, 496 P.2d 817, 101 Cal. Rptr. 745 (1972).

^{13.} Committee on Children's Television, Inc. v. General Foods Corp., 35 Cal. 3d 197, 210, 673 P.2d 660, 197 Cal. Rptr. 783 (1983).

Both private and public plaintiffs may seek injunctive relief, including restitution of money or property that may have been acquired through the unfair practice. ¹⁴ Public officials may also seek civil penalties, varying from \$2500 to \$6000 per violation. ¹⁵ The statute sets forth a number of considerations for determining the appropriate amount of civil penalties, ¹⁶ and in some cases, provides that an award of restitution is preferred over a civil penalty. ¹⁷ Damages at law, including punitive damages, are not available under the unfair competition law to either public or private plaintiffs. ¹⁸

The limitation on the type of recovery available under the unfair competition law probably acts as only a minor restraint on litigation. Substantial restitution may be available in an action on behalf of the general public, either as traditionally determined or through the more modern techniques of fluid recovery or cy pres relief. A prevailing plaintiff who vindicates a public right may be entitled to substantial attorney's fees. Even in an essentially private dispute between business competitors, more in line with the historical origins of the statute, an unfair competition cause of action on behalf of the general public may be added to a complaint because it facilitates liberal discovery and adds settlement leverage. 21

Thus, the unfair competition law provides a "broad but shallow scheme of relief" — broad in substantive scope and standing, but shallow in terms of available

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^{14.} Sections 17203, 17535; see also Sections 17510.87 (charitable solicitations), 17511.12(a) (telephone sales), 17522 (labeling of products made by blind).

^{15.} Sections 17206 (civil penalties generally), 17206.1 (additional \$2500 civil penalty for violations involving senior citizens or disabled persons), 17207 (\$6000 civil penalty for intentional violation of injunction), 17535.5 (\$6000 civil penalty for violation of false advertising injunction).

If the action is brought by the Attorney General, the penalties are split between the state treasury and the county where the judgment is entered; if brought by a district attorney or county counsel, the entire penalty goes to the county treasury; if brought by a city attorney or prosecutor, the penalties are split between the city and the county treasuries. Sections 17206(c)(general rule), 17207 (injunction violation), 17535.5(c) (false advertising injunction violation), 17536(c) (false advertising). The statutes also provide a special rule where the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency. See Sections 17206(d), 17207(d), 17535.5(d), 17536(d).

The general false advertising statute also declares that a violation is a misdemeanor. Section 17500.

^{16.} Sections 17206(b) & 17536 (nature, seriousness, and willfulness of defendant's misconduct, number of violations, persistence and duration of misconduct, defendant's assets, liabilities, and net worth). Additional factors apply in cases involving senior citizens and disabled persons (Section 17206.1(c)) or where an injunction has been violated (Sections 17207(a), 17535.5(a)).

^{17.} Section 17206.1(d) (violations against senior citizens and disabled persons).

^{18.} Bank of the West v. Superior Court, 2 Cal. 4th 1254, 1272, 833 P.2d 545, 10 Cal. Rptr. 2d 538 (1992); Dean Witter Reynolds, Inc. v. Superior Court, 211 Cal. App. 3d 758, 774, 259 Cal. Rptr 789 (1989); Industrial Indem. Co. v. Superior Court, 209 Cal. App. 3d 1093, 1096, 257 Cal. Rptr. 656 (1989).

^{19.} See Fellmeth, *supra* note 1, at 25-26; McCall, Sturdevant, Kaplan & Hillebrand, *Greater Representation for California Consumers* — *Fluid Recovery, Consumer Trust Funds, and Representative Actions*, 46 Hastings L.J. 797, 798, 833-35 (1995).

^{20.} See Code Civ. Proc. § 1021.5 (private attorney general); Serrano v. Priest (Serrano III), 20 Cal. 3d 25, 35-38, 569 P.2d 1303, 141 Cal. Rptr. 315 (1979) (common fund doctrine).

^{21.} See Fellmeth, *supra* note 1, at 23.

relief, because monetary awards are limited to restitution and attorney's fees are uncertain even if the plaintiff prevails.²²

ISSUES AND PROBLEMS

Strategic Considerations: Representative Actions and Class Actions

From the perspective of plaintiffs with a genuine interest in vindicating the public interest, representative actions under the unfair competition law offer several distinct advantages over class actions.²³ Under the unfair competition law, a plaintiff can plead a cause of action for restitution on behalf of the general public without the complications and expenses of a class action.²⁴ The plaintiff does not have to seek certification of the class and thus avoids having to show that the action meets the standards of numerosity, commonality, adequacy, typicality, and manageability.²⁵ No type of formal certification of the representative action is required at all under the unfair competition law. Perhaps the single most significant practical factor is that the plaintiff does not have to give notice to the proposed class members, thus avoiding substantial costs. In the arena of consumer actions and public interest law, the representative action under the unfair competition law is a simpler and cheaper alternative to class actions.²⁶

Standing and Binding Effect of Representative Actions²⁷

The unfair competition law provides unusually broad, and perhaps unique, standing for private parties. They may sue on behalf of others (the "general

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The manageability requirement is contained in Rue 23(b)(3)(D).

^{22.} See Fellmeth, *supra* note 1, at 22.

^{23.} Code of Civil Procedure Section 382 provides very general authorization for class actions. The courts have developed the body of class action law, with particular reference to Rule 23 of the Federal Rules of Civil Procedure. However, California courts are not bound by federal rules that are not of constitutional dimension and have been directed to be procedurally innovative. Southern California Edison Co. v. Superior Court, 7 Cal. 3d 832, 839-43, 500 P.2d 621, 103 Cal. Rptr. 709 (1972); Vasquez v. Superior Court, 4 Cal. 3d 800, 808, 484 P.2d 964, 94 Cal. Rptr. 796 (1971); Cartt v. Superior Court, 50 Cal. App. 3d 960, 124 Cal. Rptr. 376 (1975). See generally 4 B. Witkin, Cal. Procedure *Pleading* §§ 193-237, at 225-94 (3d ed. 1985 & Supp. 1995).

^{24.} See McCall et al., supra note 19, at 839-43.

^{25.} These requirements are set forth in Rule 23 of the Federal Rules of Civil Procedure:

⁽a) One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

^{26.} McCall et al., supra note 19, at 839-43. See also Chilton & Stern, California's Unfair Business Practices Statutes: Settling the "Nonclass Class" Action and Fighting the "Two-Front War." 12 CEB Civil Litigation Rep. 95 (1990). In fact, the existence of the representative cause of action under the unfair competition law may preclude a class action in circumstances where the class action is not the demonstrably superior procedure. See Dean Witter Reynolds, Inc. v. Superior Court 211 Cal. App. 3d 758, 772, 259 Cal. Rptr. 789 (1989).

^{27.} See generally Fellmeth, *supra* note 1, at 1-2, 37-38.

public") without the need to show any personal damage arising from the unfair business practice. Those suing on behalf of the general public can range from plaintiffs having a narrow dispute with a defendant in business context, who tack on the representative claim for discovery and settlement advantages, to plaintiffs serving a true private attorney general function who seek to vindicate larger interests. The unfair competition law does not provide any mechanism to distinguish among these types of plaintiffs. The potential for abuse where a claim on behalf of the general public is tacked on for tactical advantage is mitigated only by the denial of res judicata and collateral estoppel effect as to nonparties.²⁸

While the law is not settled, it appears that where the primary purpose of the action is to obtain an injunction against an unfair business practice, a lower due process standard applies. Thus, where the plaintiff satisfies class action concepts of adequacy, it is not necessary to give the sort of notice and opt-out opportunities that are applicable in class actions seeking damages. However, the lack of any adequacy requirement under the unfair competition law may very well preclude application of this body of law where the plaintiff sues in a representative capacity.

Settlement

The opportunity to sue on behalf of the general public but without binding effect complicates the settlement process:

A plaintiff, permitted to assert claims of absent persons, may be tempted to settle those claims by taking a larger payment for himself or herself and a lower payment for the absent persons. This invites "blackmail" suits, a prospect worsened by the fact that lawyers can sue without the need for an injured client, eliminating even that modest restraint....

Defendant, too, may see an opportunity to settle the absent persons' claims cheaply by paying the individual plaintiff a premium and the absent persons little or nothing.³⁰

Even where the plaintiff, such as a public prosecutor or bona fide public interest group, legitimately desire to confer finality and binding effect in a settlement with the defendant, the parties are unable to do so under the unfair competition law.³¹ Hence, the legitimate goals of the unfair competition law are thwarted its standing rules in combination with constitutional limitations on the binding effect of representative actions on absent parties.

^{28.} There is a danger to a defendant who loses after a trial, however, since the defendant may be bound in a later action by a stranger to the first action under doctrines permitting offensive one-way collateral estoppel. See Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); 7 B. Witkin, California Procedure *Judgment* §§ 301-10, at 739-51 (3d ed. 1985).

^{29.} See Fed. R. Civ. Proc. 23(b)(2); Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); Vasquez v. Superior Court, 4 Cal. 3d 800, 821, 484 P.2d 964, 94 Cal. Rptr. 796, 809 (1971); Frazier v. City of Richmond, 184 Cal. App. 3d 1491, 1500, 228 Cal. Rptr 376, 381 (1986).

^{30.} Chilton & Stern, supra note 26, at 96.

^{31.} Fellmeth, supra note 1, at 2, 26.

Conflicting and Repetitive Actions

The potential for a multiplicity of actions under the unfair competition law and overlapping or parallel proceedings is troublesome. Some commentators have termed this prospect the "two-front war."³² This situation can result because there is no limitation on multiple plaintiffs seeking relief for the same public victims. The multiplicity may involve public and private plaintiffs in a variety of situations. Cases may overlap and conflict where they are proceeding contemporaneously, where different geographical jurisdictions are involved, or where another action on the same underlying claim is brought after settlement or judgment in a prior action.

Public-private overlap. A private plaintiff may hold up a public prosecutor's attempt to settle a dispute.³³ Such a conflict may reflect an important concern over the appropriate allocation of relief between civil penalties, fluid recovery, or direct restitution, or it may be a case of a hold-up for attorney's fees. On the other hand, an intervening public prosecutor's claim for injunction and penalties may disrupt a broader claim for damages and other relief by a private plaintiff.

Public prosecutor overlap. There also may be coordination problems in actions brought by public prosecutors.³⁴ The district attorneys and the Attorney General have created a voluntary system for coordinating investigations and actions by public prosecutors. But the law is still unclear on the effect of local or regional actions by public prosecutors.

Repetitive actions. In the absence of binding effect on non-litigants, a defendant theoretically faces the prospect of an open-ended series of claims for restitution under the unfair competition law. This does not yet appear to be a real problem in practice, perhaps because of a natural disincentive for plaintiffs' lawyers to attempt to dip into the same pocket. And if the public interest has been vindicated in a suit by a public prosecutor, later potential plaintiffs would naturally be expected to face major hurdles in convincing a court to reexamine the public interest determinations in the earlier case.

^{32.} Chilton & Stern, supra note 26, at 95.

^{33.} See the discussion of the Cox Cable cases in San Diego County in Fellmeth, *supra* note 1, at 28-29 & nn. 112-13.

^{34.} See People v. Hy-Lond Enterprises, Inc., 93 Cal. App. 3d 734, 155 Cal. Rptr. 880 (1979); Fellmeth, *supra* note 1, at 27-28.

COMMISSION RECOMMENDATIONS

The Commission recommends a set of procedural revisions to put litigation under the unfair competition law on a sound footing. The proposed statute would be added to the Code of Civil Procedure as a separate chapter dealing with representative actions.³⁵

Form of Pleadings

A complaint under Business and Professions Code Section 17204 or 17535 on behalf of the general public would have to be separately stated in the pleadings and specifically state that the cause of action is being brought "on behalf of the general public." This detail facilitates appropriate treatment under the statute and should help to focus the attention of the parties.

Notice of Filing Representative Actions to Attorney General

At the time of filing a representative action on behalf of the general public, a private plaintiff would be required to give notice to the Attorney General. The notice would be for informational purposes, so that prosecutors would be aware through their existing voluntary system of potentially competing private actions. Receipt of notice would not impose any duty on the Attorney General or other prosecutor to investigate or intervene in the private action.

Adequacy of Representation and Absence of Conflict of Interest

The open-ended standing rules of existing law should be revised to provide minimal protections. A private plaintiff should not be able to proceed in a representative action on behalf of the general public unless the plaintiff's attorney is an adequate representative of the public interest. Hence, the attorney for a private plaintiff would be required to apply to the court for approval to act as counsel for the interests of the general public pled. This rule does not go as far as requiring that the plaintiff be an adequate representative of the class, as is required in class action litigation.

In addition, neither the plaintiff nor the plaintiff's attorney may proceed if either of them has a conflict of interest that reasonably could compromise the good faith representation of the interests of the general public pled.

The adequacy of representation and lack of conflict of interest issues would be determined by the court as soon as practicable after commencement of the action. The proposed statute thus requires an affirmative finding by the court that the minimum requirements have been met at an early stage of the proceedings. This rule should provide some guarantee that the action is brought in good faith, without the need to satisfy the class certification rules applicable. If the private plaintiff and plaintiff's counsel do not meet the statutory requirements, the

^{35.} See "Proposed Legislation" infra. [This refers to the draft attached to Memorandum 95-43.]

representative cause of action would be stricken from the complaint with prejudice.

Defendant's Disclosure of Other Cases

The defendant would be required to disclose any other representative or class actions pending in California based on substantially similar facts and theories of liability. This is a continuing duty, so that if such a representative or class action is filed when a representative action is pending, the defendant would be required to give notice to the plaintiff and the court of the later actions. This disclosure requirement is intended to help the court to determine which plaintiff is best suited to move forward or to make other appropriate orders, such as for consolidation or abatement.

Notice of Proposed Settlement

The proposed law would require that notice of the terms of a proposed judgment be given to other parties with cases pending against the defendant based on substantially similar facts and theories of liability and to the Attorney General [and any regulatory agency with jurisdiction over the defendant relevant to the allegations in the pleadings] at least 45 days before entry of judgment. Since the interests of the general public are being determined in a representative action, any interested person would have the opportunity to apply for leave to be heard when the court considers entry of judgment. Although this procedure is quite different from that applicable to class actions, the intent is to afford a broader scope of participation by potentially interested persons than would generally be available.

Court Review and Approval of Settlements

The proposed law requires the court to review the proposed settlement of a claim determining the interests of the general public under the unfair competition law. The court would have to affirmatively find that the plaintiff and the plaintiff's attorney have met the adequacy and conflict of interest requirements, that appropriate notices have been given, that the entry of judgment is in the interests of justice, and that any attorney's fees meet the statutory requirements. Formalizing the process for entering a judgment, whether pursuant to a stipulation or after trial, should help guarantee that judgments in representative actions are actually in the public interest. These rules should limit the temptation for a defendant to select a week or collusive plaintiff with whom to settle and for a plaintiff to sell out the absent members of the public.³⁶

^{36.} The notice and hearing provisions would not apply to the Attorney General or other prosecutors unless the Attorney General has received notice of the filing of a private action based on substantially similar facts and theories of liability before the judgment is entered in the public prosecutor's action. This exception is intended to preserve the law enforcement function of the prosecutors without unnecessary delay that would be caused by delaying entry of judgment for notice and hearing.

Binding Effect of Representative Actions

The proposed law fills a critical gap in the unfair competition law by providing a limited binding effect on nonparties of a determination of a representative cause of action. If the proposed statutory requirements of notice, adequacy, and court review and approval have been followed, the judgment as to the public interest bars further claims on behalf of the general public. In other words, a judgment in a representative action on behalf of the general public under the unfair competition law is entitled to res judicata and collateral estoppel effect as to the interest of the general public pled.

A nonparty individual's claim for restitution or damages for injury suffered by the individual that arises out of the same facts would not be barred, but the plaintiff would not be able to make a claim on behalf of the general public. This rule does not affect the due process rights of any person who has a personal claim for relief. An injured person is able to "opt out" of the settlement or judgment, in effect, by bringing an action on his or her own behalf. The injured person's due process rights are not affected and class action formalities are unnecessary in the representative action to obtain limited binding effect. In order to avoid duplicate recovery, any monetary relief received by the individual would, however, be reduced by the amount of any restitution received in the representative action.

The proposed law thus restricts the individual's statutory right under the unfair competition law to bring a representative action on behalf of the general public. The individual's constitutional right not to have a cause of action in the individual's own right determined without due process is not impaired. But the individual has no constitutional right to bring a representative action,³⁷ and the right to bring representative actions, which is granted by statute, can be limited by statute or repealed.

[Staff Note. This discussion does not include a description of draft Section 385.36 (binding effect on individual claims).]

Priority Between Public and Private Plaintiffs³⁸

If both private and public plaintiffs have commenced representative actions on behalf of the general public against the same defendant based on substantially

^{37.} See Fletcher v. Security Pacific Nat'l Bank, 23 Cal. 3d 442, 454, 591 P.2d 51, 153 Cal. Rptr. 28 (1979); Bronco Wine Co. v. Frank A. Logoluso Farms, 214 Cal. App. 3d 699, 718-20, 262 Cal. Rptr. 899 (1989).

^{38.} The proposed law does not deal with potential conflicts between public prosecutors on the assumption that the informal system currently in place for coordinating public prosecutors' activities, managed by the California District Attorneys Association and the Attorney General, is sufficient protection. See Fellmeth, *supra* note 1, at 22-23. Thus, the Commission is assured that the situation in People v. Hy-Lond Enterprises, Inc., 93 Cal. App. 3d 734, 155 Cal. Rptr. 880 (1979), would not occur today and there is no need to impose additional rules by statute. Prof. Fellmeth notes, however, that there is "surprisingly little law covering the extraterritorial jurisdiction of a district attorney in public civil filings." Fellmeth, *supra* note 1, at 27 n. 11. See also Chilton & Stern, *supra* note 26, at 100 (referring to informal understanding among Bay Area prosecutors to avoid overlapping actions).

similar facts and theories of liability, the court in either action, on motion of a party or on its own motion, may determine which action should proceed and stay the other action. The proposed law creates a presumption in favor of a public prosecutor as the representative of the general public,³⁹ but permits a private plaintiff to overcome the presumption by showing that the public prosecutor has a substantial conflict of interest or that the private plaintiff has substantially superior resources and expertise in the case.

Attorney's fees

The proposed law emphasizes the need to determine that a benefit is conferred on the general public in making awards of attorney's fees in representative actions. In cases where a public prosecutor has taken over an action from a private plaintiff, the proposal makes clear the private plaintiff may still be entitled to costs and attorney's fees under Code of Civil Procedure Section 1021.5 or other law. These rules are intended to encourage private plaintiffs to work with public prosecutors rather than competing with them and seeking a separate settlement.

Application to Pending Cases

The proposed law would apply to cases pending on its operative date unless the court determines that to do so would interfere with the effective conduct of the action or the rights of parties or other persons. Special rules concerning filing deadlines are provided to permit application of the statute to cases filed before the operative date. These rules enable the proposed law to try to accomplish its purposes at the earliest opportunity.

^{39.} This rule takes a different approach from the language in People v. Pacific Land Research Co., 20 Cal. 3d 10, 18, 569 P.2d 125 141 Cal. Rptr. 20, 24 (1977), where the Supreme Court noted that a public prosecutor's "role as a protector of the public may be inconsistent with the welfare of the class so that he could not adequately protect their interests." However, in light of the other procedural protections offered by the proposed statute, the rebuttable presumption is appropriate. See also People v. Superior Court (Good), 17 Cal. 3d 732, 552 P.2d 760, 131 Cal. Rptr. 800 (1976) (intervention in district attorney's unfair competition law action by private plaintiffs).

PROPOSED LEGISLATION [STAFF DRAFT]

Code of Civ. Proc. §§ 385.10-385.44 (added). Representative	actions
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Code of Civ. Proc. §§ 385.10-385.44 (added). Representative actions	
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Code of Civ. Proc. §§ 385.10-385.44 (added). Representative actions	
SECTION 1. Chapter 5.5 (commencing with Section 385.10) is added to '	Title 3
of Part 2 of the Code of Civil Procedure, to read:	
CHAPTER 5.5. REPRESENTATIVE ACTIONS ON	
BEHALF OF GENERAL PUBLIC	

Staff Note. As to the issue of where the statute would be best located, see the discussion in Memorandum 95-57. 7

§ 385.10. Definitions

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- 385.10. As used in this chapter:
- (a) "Private plaintiff" means a person other than a prosecutor.
- (b) "Prosecutor" means the Attorney General or appropriate district attorney, county counsel, city attorney, or city prosecutor.
- (c) "Representative action" means an action that includes a representative cause of action.
- (d) "Representative cause of action" means a cause of action on behalf of the general public under Section 17204 or 17535 of the Business and Professions Code[, and includes a cause of action in the name of the people brought by a prosecutor].
- Comment. Section 385.10 defines terms used in this chapter. See also Section 17 (general definitions). For prosecutors empowered to bring actions for unfair competition or false advertising, see, e.g., Bus. & Prof. Code §§ 17204, 17204.5, 17206.5, 17207, 17535, 17536. Representative actions are not class actions, however, a private plaintiff may be a certified class

- that is also suing in a representative capacity on behalf of the non-class general public under Business and Professions Code Section 17204 or 17535.
- 3 Staff Note. The language in brackets in subdivision (d) preserves the concept that the definitions are broad in scope. If a particular provision is limited to private plaintiffs, the section
- 5 will so state. But in other situations, the same rule applies to representative actions brought by
- 6 private and public plaintiffs. If the statute is ultimately limited so that the definition does not need
 - to be this general, then the bracketed language can be removed.

§ 385.20. Prerequisites for pleading representative cause of action

- 385.20. (a) A private plaintiff may plead a representative cause of action on behalf of the general public under Section 17204 or 17535 of the Business and Professions Code only if the requirements of this chapter are satisfied.
- (b) The private plaintiff shall separately state the representative cause of action in the pleadings, and shall designate the representative cause of action as being brought "on behalf of the general public" under Section 17204 or 17535 of the Business and Professions Code, as applicable.
- **Comment.** Subdivision (a) of Section 385.20 provides the scope of this chapter. If an action is no longer a "representative action," then the procedures of this chapter would cease to apply.
- Subdivision (b) provides a technical rule on the form of pleadings that include a representative cause of action for unfair competition or false advertising under the Business and Professions Code.
- See Sections 385.10(a) ("private plaintiff" defined), 386.10(d) ("representative cause of action" defined).

§ 385.22. Adequate legal representation

- 385.22. (a) The attorney for a private plaintiff in a representative action must be an adequate legal representative of the interests of the general public pled.
- (b) As soon as practicable after the commencement of the representative action, the attorney for the private plaintiff shall apply to the court for an order approving the attorney as the legal representative of the interests of the general public in the action. In making its determination, the court may consider standards applied in class actions. Discovery is not available regarding the issue of adequacy of legal representation, but the court may inquire into the matter in its discretion. If the court determines that the requirement of subdivision (a) is not satisfied, the representative cause of action shall be stricken from the complaint.
- (c) An order under this subdivision may be conditional, and may be modified before judgment in the action.

Comment. Section 385.22 sets forth the prerequisite of adequacy of counsel to represent the general public in an action for unfair competition or false advertising. Consistent with the broad approach to standing codified in Business and Professions Code Sections 17204 and 17535, Section 385.22 does not require the private plaintiff to be a member of the injured group.

Subdivision (b) requires the private plaintiff's attorney to apply for approval in order to proceed with a representative action. The court is given broad discretion in making its determination, including the power to investigate any issues that arise, but discovery is specifically forbidden in the interests of efficiency. The plaintiff cannot obtain a ruling on the merits of the complaint without first satisfying this section and the conflict of interest rule in Section 385.23.

Subdivisions (b) and (c) are drawn in part from Rule 23(c)(1) of the Federal Rules of Civil Procedure, applicable to class actions. Before entry of judgment in the representative action, the

court is also required to make a finding that the standards in this section have been satisfied. See Section 385.30 (findings required for entry of judgment).

See also Sections 385.10(a) ("private plaintiff" defined), 385.10(c) ("representative action" defined).

Staff Note

- 1. The provisions concerning the adequacy of counsel and conflict of interest have been split. See Section 385.23 (conflict of interest).
- 2. The staff intends to do more work on this section, particularly with regard to the class action standards which have not yet been researched. But it may be sufficient to refer in general terms to class action standards as in subdivision (b).
- 3. This section does not apply to prosecutors. The issues of conflict of interest and the adequacy of the prosecutor's resources are dealt with in a different fashion in draft Section 385.40 (priority between prosecutor and private plaintiff). The statutory scheme thus places some threshold requirements on private plaintiffs that are presumed *ex officio* in the case of prosecutors.

§ 385.23. Conflict of interest

- 385.23. (a) Neither a private plaintiff nor the plaintiff's attorney in a representative action may have a conflict of interest that reasonably could compromise the good faith representation of the interests of the general public pled.
- (b) As soon as practicable after the commencement of the representative action, the court shall determine by order whether the requirements of subdivision (a) are satisfied. The determination shall be based on the pleadings and discovery is not available. If the court determines that the requirements of subdivision (a) are not satisfied, the representative cause of action shall be stricken from the complaint.
- (c) An order under this section may be conditional, and may be modified before judgment in the action.

Comment. Section 385.22 precludes conflict of interest applicable to bringing an action for unfair competition or false advertising on behalf of the general public. Consistent with the broad approach to standing codified in Business and Professions Code Sections 17204 and 17535, Section 385.22 does not require the private plaintiff to be a member of the injured group. The plaintiff cannot obtain a ruling on the merits of the complaint without first satisfying this section and the adequacy of representation rule in Section 385.22.

Subdivision (c) is drawn from Rule 23(c)(1) of the Federal Rules of Civil Procedure, applicable to class actions. Before entry of judgment in the representative action, the court is also required to make a finding that the standards in this section have been satisfied. See Section 385.30 (findings required for entry of judgment).

See also Sections 385.10(a) ("private plaintiff" defined), 385.10(c) ("representative action" defined).

Staff Note. This section has been separated from Section 385.22 (adequate legal representation) because different standards apply, as decided at the September meeting.

§ 385.24. Notice to Attorney General

385.24. Not later than 10 days after a private plaintiff commences a representative action or amends a complaint to add a representative cause of action, the private plaintiff shall give notice of the filing or amendment, together with a copy of the complaint, to the Attorney General.

Comment. Section 385.24 provides for notice of filing of a representative action and a copy of the complaint to be given to the Attorney General. The notice and copy required by this section are given for informational purposes only. This section is not intended to create or imply any duty on the part of the Attorney General or other prosecutor to intervene or take other action in response to the notice.

See also Sections 385.10(a) ("private plaintiff" defined), 385.10(c) ("representative action" defined), 385.10(d) ("representative cause of action" defined).

Staff Note

- 1. At the September meeting, the Commission decided that notice of the filing of a private action should be given to the Attorney General. The idea of a published register was abandoned. Interested local prosecutors will become informed through the voluntary system maintained by the California District Attorneys Association and the Attorney General's Office. The 10-day period is drawn from Code of Civil Procedure Section 388 (notice to AG of pleadings alleging environmental effects concerning public generally).
- 2. The section applies only to filings by private plaintiffs. This assumes that prosecutors will be voluntarily complying with the system for coordination used by the district attorneys and Attorney General.

§ 385.26. Disclosure of similar cases against defendant

- 385.26. (a) Promptly after a representative action is filed, the defendant shall notify the plaintiff and the court in the representative action of any other representative actions or class actions pending in this state against the defendant that are based on substantially similar facts and theories of liability.
- (b) Promptly after a representative action or class action is filed in this state, the defendant shall give notice of the filing to the plaintiff and the court in all pending representative actions in this state against the defendant that are based on substantially similar facts and theories of liability.
- **Comment.** Section 385.26 requires the defendant to disclose similar cases pending or later filed in California. This section applies as to actions brought by either private plaintiffs or prosecutors. See Sections 385.10(a) ("private plaintiff" defined), 385.10(b) ("prosecutor" defined), 385.10(c) ("representative action" defined).

Staff Note

- 1. This section does not provide any particular time limits. Ultimately, the disclosure must take place in order for the court to make the necessary findings under Section 385.30.
- 2. Subdivision (b) has been added in response to a suggestion from S. Chandler Visher in connection with the earlier draft. (See Exhibit p. 33.)
 - 3. Consumers Union suggests in Exhibit p. 11, item 4:
 - If the res judicata approach of the draft is adopted, then it would be critical that the penalty for failure to disclose to include failure to achieve res judicata status for the judgment as against those parties who had pending cases and received no direct notice because the defendant did not disclose the existence of those cases.

§ 385.28. Notice of terms of judgment

385.28. (a) Except as provided in Section 385.31, at least 45 days before entry of a judgment in the representative action, or any modification of the judgment, which is a final determination of the representative cause of action, the plaintiff shall give notice of the proposed terms of the judgment or modification, including all stipulations and associated agreements between the parties, together with notice

of the time and place set for the hearing on entry of the judgment or modification, to all of the following:

- (1) Other parties with cases pending against the defendant based on substantially similar facts and theories of liability.
 - (2) The Attorney General.

- (3) Any prosecutor who has filed a request for notice with the court.
- [(4) Any regulatory agency with jurisdiction over the defendant relevant to the allegations in the pleadings.]
- (b) A person given notice under subdivision (a) or any other interested person may apply to the court for leave to intervene in the hearing provided by Section 385.30. Nothing in this subdivision limits any other right a person may have to intervene in the action.
- (c) The court for good cause may shorten or lengthen the time for giving notice under subdivision (a), on the motion of a party or on the court's own motion.

Comment. Subdivision (a) of Section 385.28 requires notice of the terms of any proposed disposition of the representative action to other interested parties. This section applies to both private plaintiffs and prosecutors. The 45-day notice period is subject to variation on court order pursuant to subdivision (c).

Subdivision (b) recognizes a limited right to intervene in the hearing for approval of the terms of the judgment provided by Section 385.30.

See also Sections 385.10(a) ("private plaintiff" defined), 385.10(b) ("prosecutor" defined), 385.10(c) ("representative action" defined), 385.10(d) ("representative cause of action" defined).

Staff Note

- 1. Paragraph (3) has been added to subdivision (a) to implement a decision at the September meeting. References to the Attorney General's register have also been deleted as decided.
- 2. Prof. Fellmeth's draft proposes the regulatory agency notice provided here in subdivision (a)(3). (See Exhibit p. 4.) This may be a useful provision, but the staff has doubts about how it would be implemented. The plaintiff would have to determine any and all agencies with appropriate jurisdiction and then determine which should get notice. Making these determinations could be daunting. If the purpose of this notice is informational, then interested agencies can read the register of representative actions and monitor the action or intervene as desired. What would be the consequence of failure to give this type of notice to the appropriate agency? S. Chandler Visher suggests that the defendant should have to tell the plaintiff which agencies regulate it. (See Exhibit p. 33.) Consumers Union also suggests a "safe harbor" so that the notice provision is satisfied if notice is given to agencies disclosed by the defendant. (See Exhibit p. 12.)
- 3. There is a bit of slack here since subdivision (a)(1) requires notice to parties in other similar cases against the defendant, but the plaintiff may not have sufficient information because the defendant may not have given notice of similar cases pursuant to draft Section 385.26. We could provide, as suggested by several commentators, that plaintiff's without notice would not be bound by the judgment in this action.
- 4. Subdivision (b) provides an opportunity for nonparties to be heard in the hearing for approval of the terms of judgment in the representative action. The "other interested persons" language raises the issue of how open this procedure should be. Consumers Union supports permitting interested persons to participate. (See Exhibit pp. 12-13.) CU argues that

interested persons such as consumer organizations are sometimes the most effective potential objectors to an inadequate proposed settlement.... [The statute] should permit and indeed encourage comment on the adequacy of the proposed judgment from the widest possible group ... which might include other persons with claims that have not yet been filed against the defendant, or watchdog public interest groups, or regulatory agencies which did not receive direct notice.

- 5. Is it useful to refer specifically to modifications in this section? Alternatives are to drop such references as unnecessary or rely on a separate subdivision stating that the section applies to modifications with the same force. The rule in draft Section 385.33 may provide sufficient protections.
- 6. S. Chandler Visher argues that there should be an exemption for small cases from this "cumbersome procedure" referring to this section and Section 385.30. (See Exhibit p. 33.) He suggests that the procedure be made optional when one of the parties wants to achieve binding effect. (A similar idea was discussed at the September meeting.)

§ 385.30. Findings required for entry of judgment

- 385.30. (a) Except as provided in Section 385.31, before entry of a judgment in the representative action that is a final determination of the representative cause of action, a hearing shall be held to determine whether the requirements of this chapter have been satisfied.
- (b) At the hearing, the court shall consider the showing made by the parties and any other persons permitted to appear and shall order entry of judgment only if the court finds that all of the following requirements have been satisfied:
- (1) The plaintiff and the plaintiff's attorney satisfy the requirements of Section 385.22 and 385.23.
 - (2) The defendant has disclosed other pending cases pursuant to Section 385.26.
 - (3) Notice has been given pursuant to Sections 385.24 and 385.28.
- (4) The proposed judgment and any stipulations and associated agreements are fair and adequate to protect the interests of the general public pled.
- (5) The pleadings have not been amended, or supplemented by any stipulations or associated agreements, to the detriment of the interests of the general public pled.
 - (6) Entry of the judgment is in the interests of justice.
- (7) Any award of attorney's fees included in the judgment or any stipulation or associated agreements complies with Section 385.42.
- **Comment.** Section 385.30 provides for a hearing as a prerequisite to entry of judgment on a cause of action on behalf of the general public for unfair competition or false advertising.
- See also Sections 385.10(c) ("representative action" defined), 385.10(d) ("representative cause of action" defined).

Staff Note

- 1. This section is drawn in part from Prof. Fellmeth's draft in Exhibit pp. 4-5.
- 2. Consumers Union would expand this section to permit comment by "any person on the fairness or adequacy of the proposed judgment." (See Exhibit p. 13.) CU notes that the statute requires the court to find entry of judgment to be in the interests of justice but does not require the court to accept or consider comments of the public.

§ 385.31. Application of notice and hearing requirements to prosecutor

385.31. The notice and hearing requirements of Sections 385.28 and 385.30 do not apply to a representative action brought by a prosecutor unless, prior to the entry of judgment, notice has been given to the Attorney General of a pending representative action brought by a private plaintiff based on substantially similar facts and theories of liability.

Comment. Section 385.31 provides a limitation on the application of the notice and hearing requirements of this chapter to representative actions brought by public prosecutors. This section is intended to avoid interference with the law enforcement functions of a prosecutor except where there is likely possibility of a conflicting private representative action.

See also Sections 385.10(a) ("private plaintiff" defined), 385.10(b) ("prosecutor" defined), 385.(c) ("representative action" defined).

Staff Note. This section is intended to implement a decision made at the September meeting.

§ 385.32. Preliminary relief

385.32. During the pendency of the representative action, the court may grant preliminary relief relative to the representative cause of action in the interest of justice.

Comment. Section 385.32 makes clear that preliminary relief is available in a representative action. See also Sections 128 (power of courts), 385.10(c) ("representative action" defined), 385.10(d) ("representative cause of action" defined).

Staff Note. This provision is drawn from Prof. Fellmeth's draft. Is it useful? Or does it unnecessarily duplicate inherent equitable authority of the court?

§ 385.33. Dismissal, settlement, compromise

385.33. A representative action may not be dismissed, settled, or compromised without the approval of the court. If the representative action is dismissed, settled, or compromised with prejudice, or the complaint is amended to strike the representative cause of action with prejudice, the notice and hearing requirements of Sections 385.28 and 385.30 must be satisfied.

Comment. The first sentence of Section 385.33 is drawn from Rule 23(e) of the Federal Rules of Civil Procedure relating to class actions and Civil Code Section 1782(f) (Consumers Legal Remedies Act).

Staff Note. The first sentence has been pulled from what was Section 385.30(c) in the prior draft. The second sentence is intended to implement a decision made at the September meeting.

§ 385.34. Binding effect of representative action

385.34. (a) Except as otherwise provided in subdivision (b), the determination of a representative cause of action in a judgment approved by the court pursuant to Section 385.30 is binding and conclusive on all persons.

(b) A person who commences an action based on damage to the person individually, as distinguished from a cause of action in a representative capacity, is not bound by the judgment on the representative cause of action, except that any monetary recovery awarded to the person individually shall be reduced by the amount of any monetary recovery the person received as a result of the representative action.

Comment. Section 385.34 governs the binding effect of a representative action under this chapter. Subdivision (a) makes clear that the final determination of the representative cause of action (i.e., the cause of action on behalf of the general public under Business and Professions Code Section 17204 or 17535, as provided in Section 385.30) is res judicata. In other words, the determination of the cause of action on behalf of the general public has been made and other plaintiffs are precluded from reasserting the same claim on behalf of the general public. See also

Section 1908 (binding effect of judgments generally). This effect applies to any relief granted the general public, whether by way of injunction or restitution or otherwise.

Subdivision (b) provides a notable exception to the rule in subdivision (a). A person who claims to have suffered damage as an individual is not precluded from bringing an action on that claim, even though the question of the harm to the general public has been determined conclusively. However, even if the person prevails on this claim, any monetary recovery (whether damages or restitution) is to be reduced by the amount of any restitution received by the person as a member of the general public in the representative action.

See also Sections 385.10(c) ("representative action" defined), 385.10(d) ("representative cause of action" defined).

Staff Note

- 1. Prof. Fellmeth's draft splits this rule into two parts, one applicable to actions brought by private plaintiffs and the other to actions brought by prosecutors. (See Exhibit pp. 2 & 5.) After boiling the draft down, the staff concluded that one general rule would be preferable.
- 2. Prof. Fellmeth also proposes to state the effect of the judgment on absent class members in the case of a class action, but the staff is not convinced this is needed and we are unclear on how to do it correctly if it is a needed feature. Prof. Fellmeth's draft provision is as follows:

Such an action on behalf of the "general public" is res judicate only insofar as it bars actions on behalf of the general public or absent class members. Named parties bringing suit because of damage or harm to them individually are not collaterally estopped by the judgment unless the requirements of Section 382 [class actions] are met.

3. Should subdivision (b) be strictly limited to monetary setoff? Prof. Fellmeth's draft includes language that might be interpreted more broadly:

[A]n individual may be collaterally estopped from litigating as to damages or harm he or she has suffered where he or she has accepted and benefitted from restitutionary relief granted to the general public or to others, sufficient to satisfy or recompense him or her for those claims.

- 4. Consumers Union would delete this and the next section. (See Exhibit pp. 10, 14.) CU is not persuaded that the res judicata rule is "really necessary to avoid the problems that have been alleged in Unfair Competition Act actions." CU argues that the court in a second similar case on behalf of the general public would have the inherent power to dismiss the action based on mootness. The letter refers to an argument of this kind CU is making in a case currently on appeal. The staff will follow this matter and relay any additional information from CU on the topic. However, with the information at hand, and taking into account the arguments made by Prof. Fellmeth in his background study and various presentations to the Commission, the staff still considers a clear, if limited, binding effect to be a significant element of the proposed scheme. In addition, if the same result is to be achieved through mootness, the objection to the limited statutory rule on binding effect is not clear.
- 5. Consumers Union alternatively suggests that a provision be added authorizing the court to determine the degree to which res judicata should apply before entering judgment. (See Exhibit p. 13.) This is feasible if the court were permitted to decide that the judgment is *not* to have binding effect, but the court cannot specify binding effect in any meaningful way in advance. Should the statute authorize the court to limit binding effect?
- 6. The CDAA would limit the binding effect of a prior representative action to later actions brought by *private* plaintiffs. (See Exhibit 19-21, 25.) This is consistent with the CDAA position giving public prosecutor actions a higher or different status than representative actions by private plaintiffs, based in part on the broader relief available in public prosecutor actions and the law enforcement function of prosecutors.
- 7. A different view of the issue raised by CDAA is reflected in S. Chandler Visher's suggestion in Exhibit p. 34:

At a minimum this section should apply to DA cases when there has been an order of restitution and the court has made a finding that a private action seeking damages and restitution would likely not have obtained more restitution damages for the class than the DA case.

- 8. Jan Chilton asks whether the statute of limitations applicable to individual claims should be stayed during the pendency of the representative action. (See Exhibit p. 28, item 2d.)
- 9. Jan Chilton suggests evening the playing field by precluding individuals from claiming benefits of collateral estoppel arising from the representative action. (Exhibit p. 30, item 10.) The staff believes this is counter to existing case law, although that does not prevent adopting the suggested approach as a statutory rule. Mr. Chilton would keep some version of the res judicata rule. (Exhibit p. 31, postscript.)

[§ 385.36. Binding effect on individual claims — included for purposes of discussion]

- 385.36. The determination of a representative cause of action on behalf of the general public in a judgment approved by the court pursuant to Section 385.30 is binding and conclusive as to an action brought by a private plaintiff for restitution or damages on the individual's own behalf, if the following conditions are satisfied:
- (a) Notice is given sufficient to protect the due process rights of absent members of the public who may be bound by the representative action, either by individual notice, or by publication or other forms of notice ordered by the court if individual notice is not practical, of the terms of the restitution and of the time and place of a hearing to consider its approval.
- (b) At or before the hearing, a person desiring to opt out of the injunctive or restitutionary terms of the judgment shall have an opportunity to be so excluded.
- (c) Any person objecting to the fairness or adequacy of the proposed judgment shall have an opportunity to comment.
- (d) The court shall consider all comments relevant to the proposed judgment and may alter its terms or its binding effect in the interests of justice.
- **Comment.** Section 385.36 provides for a limited binding effect of a representative action on individual claims. See also Sections 385.10(a) ("private plaintiff" defined), 385.10(c) ("representative action" defined).

Staff Note

- 1. This section is drawn from Prof. Fellmeth's draft at Exhibit p. 2 and is included for discussion purposes the staff is not recommending it. Under Prof. Fellmeth's draft, this rule would apparently be applied only where the action was brought by a prosecutor. Based on the discussion at the June meeting, the staff has some doubt that the Commission wants to attempt to extend the res judicata effect this far, or if so, whether these proposed safeguards are sufficient to accomplish the goal.
- 2. As discussed in Memorandum 95-35 (considered at the June meeting), notice to absentees at the inception of a lawsuit is not interchangeable for constitutional purposes with notice of proposed settlement terms. As presently drafted, this section appears to require the latter type of notice, but not the former. There is some question whether this can constitutionally achieve its purpose.
- 3. Another concern is that permitting opt-out after the terms are known may significantly inhibit settlement. If the terms are favorable to the general public, absent members of the public are likely to accept the settlement, but otherwise they are likely to opt out if the stakes are high enough. "From a defendant's viewpoint, this is said to result in 'an open-ended lawsuit that cannot be defeated, cannot be settled, and cannot be adjudicated." People v. Pacific Land Research co. 20 Cal. 3d 10, 17, 569 P.2d 125, 141 Cal. Rptr. 20 (1977), quoting Home Savings & Loan Ass'n v. Superior Court, 42 Cal. App. 3d 1006, 1011, 117 Cal. Rptr. 485 (1975). This

problem of one-way intervention could be avoided by eliminating any opportunity to opt out, but that may not be constitutionally permissible. See Memorandum 95-35.

- 4. Alternatively, the statute could require opt-out at the inception of a representative action, which would necessitate notice at inception and its concomitant expense a subject that has been frequently discussed at prior meetings. The statute could specify that such notice and opt-out privileged are necessary only for obtaining a binding effect on individual claims. The staff wonders, however, what a statute along these lines would accomplish, given the existing option of pursuing an unfair competition claim as a class action, which would cover much of the same ground.
- 5. Finally, and perhaps most importantly, adequate representation of absent members of the injured group may be a due process prerequisite to binding such members to a determination of their damage. Because this scheme, as set out in draft Section 385.22, does not require such representation, the broader res judicata provision in discussion draft Section 385.36 may run afoul of that constitutional requirement.
 - 6. Jan Chilton would delete this section. (See Exhibit p 30, item 11.)
- 7. Consumers Union would also delete this section, but would generalize the right to comment in subdivision (c) and, if a res judicata rule is included in the statute, would keep the rule permitting the court to declare the binding effect in the interests of justice in subdivision (d). (See Exhibit p. 14.)

§ 385.40. Priority between prosecutor and private plaintiff

- 385.40. (a) If a private plaintiff has commenced a representative action and a prosecutor has commenced an action against the same defendant based on substantially similar facts and theories of liability, the court in which either action is pending, on motion of a party or on the court's own motion, shall determine which action should proceed and shall stay the other action. The determination may be made at any time during the proceedings and regardless of the order in which the actions were commenced. The court may base its determination on the pleadings in the conflicting actions without hearing additional evidence.
- (b) In the case of conflicting claims to represent the general public, the prosecutor is presumed to be a superior representative of the public [and particularly of the members of the public within the prosecutor's jurisdiction]. This presumption may be overcome where a party demonstrates either of the following:
- (1) The prosecutor has a substantial conflict of interest in representing the public interest pled that is not present in the case of an alternative private plaintiff and the plaintiff's attorney.
- (2) The resources or expertise available to the prosecutor to pursue the case are inadequate and the private plaintiff has available substantially superior resources and expertise.

Comment. Section 385.40 provides for determining priority between public and private plaintiffs in conflicting actions. Subdivision (b) provides a presumption in favor of prosecutors in the area of representing the interests of the general public. See also Sections 385.10(a) ("private plaintiff" defined), 385.10(b) ("prosecutor" defined), 385.10(c) ("representative action" defined).

44 Staff Note

1. Prof. Fellmeth uses the phrase "conflict in representation" to set out the scope of this provision in his draft. (See Exhibit p. 1.) In addition, his draft refers to Section 382 (class actions)

as being a source of conflicting actions. The staff draft does not include these features, but the Commission should consider whether they are desirable.

- 2. Prof. Fellmeth's draft also applies the preference rule to conflicts "otherwise covering the same acts, bases for liability, and remedies." The staff is unclear on how far this language would extend. We have proposed a more limited rule.
- 3. The bracketed language in subdivision (b), as currently drafted, is a dead end, in that the standard for overcoming the presumption applies without regard to the local jurisdiction aspect. Should the bracketed language be dropped? Or should another preference rule be added?
- 4. The Commission should also consider the draft proposed by the CDAA. (See Exhibit pp. 9, 21-23.) This draft contains a proposed priority rule favoring prosecutors (which is not limited to unfair competition litigation), reading as follows:
 - (c) If a law enforcement agency and a private party have pending actions against the same defendant based on substantially similar alleged facts or violations of law, the court shall, upon the law enforcement agency's application, stay the private party's action, regardless of the order of filing or the stage of proceedings, until a final judgment is obtained in the law enforcement agency's action.
- 5. Consumers Union believes the draft section is a "balanced approach" and preferable to the language proposed by CDAA. (See Exhibit pp. 14-15, item 11.) CU would add a third ground for overcoming the presumption where the prosecutor "has not vigorously pursued the case." CU would also make the stay discretionary rather than mandatory, and would restrict it to cases concerning "similar time frames and geographic areas."
- 6. S. Chandler Visher suggests that the prosecutor could be presumed the better representative as to injunctive relief in all cases and with respect to restitution in cases where the prosecutor does not seek a civil penalty. (See Exhibit p. 32.) Otherwise, the private plaintiff should be presumed to be the superior representative on the issue of restitution. He would coordinate the cases, with the private plaintiff limited to the restitution issue, rather than staying the private case.
- 7. A further step could be taken to resolve the conflict between the interest of private plaintiffs in restitution and the availability of civil penalties that can attract public prosecutors by providing a preference for restitution in the general civil penalties section (Bus. & Prof. Code § 17206). Such a rule applies in cases involving senior citizens and disabled persons, where restitution "shall be given priority over recovery of any civil penalty." Bus. & Prof. Code § 17206.1(d). This rule applies only as to Section 17206.1(a) and is specifically made inapplicable to civil penalties imposed under the general provision, Section 17206(a).]
- 8. Jan Chilton finds that draft Section 385.40 "unduly favors public prosecutors." (Exhibit p. 30-31, item 12.)

§ 385.42. Attorney's fees

- 385.42. (a) In addition to any other applicable factors, any award of attorney's fees in a representative action shall be based on the work performed, the risk involved, and a consideration of benefit conferred on the general public.
- (b) If a prosecutor is given preference over a private plaintiff under Section 385.40, the private plaintiff may be entitled to costs and attorney's fees pursuant to Section 1021.5 or other applicable law.
- (c) Timely notice by the attorney for the private plaintiff of a planned or filed representative action and assistance to the prosecutor shall be relevant in meeting the requirement of beneficial contribution under Section 1021.5. Where beneficial contribution has occurred, the private plaintiff need not have been the successful party in order to qualify for an attorney's fee award under Section 1021.5.

Comment. Subdivision (a) of Section 385.42 provides special factors applicable to an award of attorney's fees in representative actions.

Subdivision (b) makes clear that the operation of the preference rule in Section 385.40 does not deprive a private party of the right to costs and attorney's fees.

Subdivision (c) encourages private plaintiffs to cooperate with prosecutors in common cases by providing an incentive to cooperate.

See also Sections 385.10(a) ("private plaintiff" defined), 385.10(b) ("prosecutor" defined), 385.10(c) ("representative action" defined).

Staff Note

- 1. Compare Prof. Fellmeth's draft on Exhibit pp. 2, 4-5.
- 2. Civil Code Section 1780(e) in the Consumers Legal Remedies Act also contains a provision that "[r]easonable attorney's fees may be awarded to a prevailing defendant upon a finding by the court that the plaintiff's prosecution of the action was not in good faith." Should such a provision be added to draft Section 385.42? Or should reliance be placed on the general bad-faith rule applicable to frivolous actions under Code of Civil Procedure Section 128.5?
- 3. Jan Chilton suggests that we coordinate the language of Section 385.42 with Code of Civil Procedure Section 1021.5. (Exhibit p. 31, item 13.) The staff agrees that more work needs to be done in this vein. Mr. Chilton disagrees with the policy of this section and would erect greater hurdles to attorney's fees awards.
 - 4. Consumers Union supports this section. (See Exhibit p. 15, item 12.)

§ 385.44. Application of chapter to pending cases

- 385.44. (a) On and after its operative date, this chapter applies to all pending representative actions, regardless of whether they were filed before the operative date, unless the court determines that application of a particular provision of this chapter would substantially interfere with the effective conduct of the action or the rights of the parties or other interested persons.
- (b) For the purpose of applying this chapter to pending actions, the duty to give notice under Section 385.24 or to provide information under Section 385.26 is satisfied if the notice or information is given promptly after the operative date of this chapter.
- **Comment.** Section 385.44 applies this chapter to all representative actions, including those filed before the operative date except where the court orders otherwise. Subdivision (a) is drawn from Section 694.020 (application of Enforcement of Judgments Law). See also Section 385.10(c) ("representative action" defined).